Supreme Court, U.S.

1168

10-243 AUG 17 2010

No. OFFICE OF THE CLERK

IN THE
Supreme Court of the United States

SONNENSCHEIN NATH & ROSENTHAL LLP,

Petitioner,

v.

DOUGLAS E. ROSENTHAL,

Respondent.

On Petition for a Writ of Certiorari
to the District of Columbia Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has supervisory authority to review decisions of the District of Columbia Court of Appeals, even where that court decides questions of "local" law, and exercises that review "in exceptional situations where egregious error has been committed," or where important federal questions are presented. *Pernell v. Southall Realty*, 416 U.S. 363, 369 (1974). This Court also has authority to review federal-court misapplications of state law and "undoubtedly should do so" where there is "blatant federal-court nullification of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996). This case presents the following important questions:

1. Whether the Court of Appeals, in a matter of great importance to the nation's law firms, blatantly nullified Delaware law governing the covenant of good faith and fair dealing by awarding damages for a law firm's compensation decisions, where the Partnership Agreement expressly covers the conduct at issue, *as the Court of Appeals itself explicitly found.*

2. Whether the Court of Appeals egregiously misapplied District of Columbia law governing remedies by ruling that respondent was entitled to seek damages for periods for which the firm's Partnership Agreement allowed no compensation, including periods *after he voluntarily retired* from the law firm, in conflict with overwhelming precedent addressing damages following voluntary retirement.

3. Whether the Court of Appeals, in conflict with decisions of this Court, violated petitioner's due process rights by allowing damages for periods for which the Partnership Agreement precluded recovery, in-

cluding a period for which critical elements of liability were never considered by any trier of fact.

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PETITION FOR A WRIT OF CERTIORARI

Sonnenschein Nath & Rosenthal LLP respectfully petitions for a writ of certiorari to review the judgment of the District of Columbia Court of Appeals in this case.

OPINIONS BELOW

The amended opinion of the District of Columbia Court of Appeals is reported at 985 A.2d 443. App., *infra*, 1a- 31a. The Court of Appeals' orders granting a petition for rehearing in part and denying a subsequent petition for rehearing of the amended opinion are unreported. *Id.* at 47a-51a. The initial opinion of the Court of Appeals is unreported. *Id.* at 52a-84a. The judgment of the trial court and orders of the trial court amending the judgment are unreported. *Id.* at 32a-46a.

JURISDICTION

The District of Columbia Court of Appeals entered judgment on December 24, 2009. *Id.* at 1a. A petition for rehearing was granted in part on March 18, 2010. *Id.* at 47a-49a. A petition for rehearing addressing the amended opinion was denied on May 20, 2010. App., *infra*, 50a-51a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause and portions of the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 84 Stat. 473 (1970), are reproduced in the appendix at App., *infra*, 85a-86a.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND

Sonnenschein Nath & Rosenthal LLP (SNR) is a large, international law firm. Douglas E. Rosenthal ("respondent") joined SNR as a partner on October 1, 1994.[1] The next year, respondent, like all other partners, executed a Partnership Agreement that provided that he would no longer be compensated as a partner if he retired. *See* App., *infra*, 88a-91a at ¶¶ 6.1, 7.1. Respondent remained a partner at SNR until he voluntarily retired on July 31, 2005. *Id.* at 92a.

For over a decade, SNR represented the families of victims of the 1988 terrorist bombing of Pan Am Flight 103 in their suit against Libya. When respondent joined SNR, he brought with him the representation of the family of one victim of that bombing, but SNR eventually represented members of twenty-three other families. Numerous SNR attorneys worked on the Libya case. Indeed, over the eleven years that SNR represented these families, some 129 SNR timekeepers (including numerous partners and associates) worked on the matter. Those timekeepers billed some 18,440 hours to the case. At times, both the firm and respondent considered the representation to be *pro bono*.

In October 2003, nine years after SNR began its representation, Libya settled the case with the Plaintiffs Committee, the entity coordinating the efforts of all the victims' families.[2] Payment under the Settlement Agreement was conditioned on the occurrence of certain political events. Two of these oc-

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[1] Mr. Rosenthal was not a named partner in SNR.

[2] Respondent served on the Plaintiffs Committee.

curred while respondent was a SNR partner, and payments were made to the families. These payments resulted in legal fees to SNR of approximately $18,000,000. App., *infra,* 4a.

When respondent worked with his colleagues on these representations, he was bound by SNR's Partnership Agreement, which he signed in 1995. That Partnership Agreement, with amendments, is the controlling document in this case. During respondent's tenure, SNR's Partnership Agreement:

> (1) expressly vested, *as the Court of Appeals found*, SNR's management committee — known as the Policy and Planning Committee — with the authority to set partner compensation every two years,
>
> (2) expressly provided, *as the Court of Appeals found*, a method for resolving outstanding compensation disputes in order to prevent later controversy,
>
> (3) expressly provided that a partner would be compensated only so long as he worked for the firm and did not take retirement status, which entitled him to certain other benefits but not compensation as a partner, and,
>
> (4) after a 1999 amendment approved by the partnership, expressly provided, *as the Court of Appeals initially found*, that the mandatory partner retirement age was 65, and not 70 as it previously had been.[3]

Id. at 3a, 7a, 74a-75a, 87a-92a.

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[3] SNR eliminated the mandatory retirement age provision in 2005 after respondent voluntarily retired.

II. THE PROCEEDINGS BELOW

A. Trial Court Proceedings

In September 2005, after he voluntarily left SNR and joined another firm, respondent sued SNR in the District of Columbia Superior Court, alleging, *inter alia*, that he had been forced to retire in violation of the Partnership Agreement and had been undercompensated for the periods 2003-2004 and 2005-2006. CA App. A-45-72. His principal claim as to 2005-2006 (the only period remaining at issue in this lawsuit) was that he had been inadequately paid after SNR received legal fees for its work for the families of the bombing victims. *Id.* at A-49-57, A-65-66. He made this claim even though his base compensation for 2005-2006 was revised upward to $800,000 from $325,000, which it had been for the previous two-year period. *Id.* at A-2507, A-2509. This was the highest percentage increase for any partner for the 2005-2006 period. *Id.* at A-2507. Had respondent remained at Sonnenschein throughout 2005, his compensation for that year would have been almost $1 million. *Id.* at A-1918.

In pursuit of his undercompensation claim, respondent alleged breach of contract, fiduciary duty, and the covenant of good faith and fair dealing. CA App. A-63-67. He also asserted claims based on quantum meruit and unjust enrichment for work on the Libya matter before he joined the firm. *Id.* at A-67-70.

SNR counterclaimed for tortious interference against respondent and Constantine Cannon, respondent's new law firm, based on their attempt to divert a $1.6 million fee owed SNR because of its representation of the family of two Lockerbie victims. *Id.* at A-286.

The trial judge granted summary judgment for SNR on respondent's forced retirement claim, finding that he voluntarily retired from SNR on July 31, 2005. *Id.* at A-356; App, *infra*, 92a. Because of that ruling, the trial judge found it unnecessary to rule on SNR's other defense that, under the Partnership Agreement in force when he left the firm, respondent would have been required to retire at the end of 2005, having by then reached the retirement age of 65. CA App. A-760. The trial court also granted summary judgment for SNR on respondent's quantum meruit and unjust enrichment claims because the Partnership Agreement covered his rights to compensation. *Id.* at A-356. Moreover, toward the end of trial, the trial court directed verdict for SNR on respondent's breach of contract claim for lack of evidence. *Id.* at A-3210-11.

The trial court left for the jury the issues of whether SNR had violated the implied covenant or breached any fiduciary obligations owed respondent. The jury charge on the implied covenant (which was agreed to by the parties and based on controlling Delaware law) instructed in part that "[e]xisting contract terms control" and that "one generally cannot base a claim for breach of the implied covenant on conduct authorized by the terms of the agreement." App., *infra*, 93a. The charge (again relying on Delaware law) also instructed that the covenant could not apply unless it was "clear" from the controlling agreement that the parties to that agreement, had they thought to negotiate about it, would have "proscribed" the challenged conduct. *Id.*

The jury found that SNR had not violated any fiduciary obligations owed respondent, but found that SNR had breached the implied covenant of good faith and fair dealing and awarded him damages for the

contract periods 2003-2004 and 2005-2006. *Id.* at 32a-33a. The jury also found for SNR on its tortious interference claim and awarded it $300,000 in damages. *Id.* at 34a.

SNR filed a post-trial motion arguing that respondent was not entitled to compensation after he voluntarily retired on July 31, 2005 because (1) the "bargain" he struck in the Partnership Agreement only allowed him compensation while he worked at SNR and (2) partners were not entitled to damages after voluntary retirement. CA App. A4747-50. The trial court ruled that respondent was not entitled to damages after he voluntary retired on July 31, 2005 and accordingly reduced the jury's award. CA App., *infra*, 37a-40a, 92a. The trial court also denied SNR's motion for judgment as a matter of law on the implied covenant. *Id.* at 41a-42a.

B. Court of Appeals Proceedings

The Court of Appeals sustained the jury's finding that the covenant of good faith and fair dealing had been violated, but reversed the trial court's determination that respondent was not entitled to damages after he retired.[4] App., *infra*, 14a. The Court of Appeals gave respondent the option of reinstating the

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[4] The Court of Appeals also reversed the jury's award for 2003-2004 because respondent had signed a document (called Schedule A) agreeing to his compensation for those years. App., *infra*, 6a-8a. Additionally, it reversed the jury's award for SNR for tortious interference, concluding that SNR was not entitled to damages under the wrongful involvement in litigation doctrine solely because cross-defendant Constantine Cannon had been a party in the New York federal court proceeding. *Id.* at 3a, 24a-30a.

jury's damage award for 2005-2006 or retrial on the damage issue.[5] *Id.* at 32a.

SNR filed a petition for rehearing noting that the Court of Appeals had ignored crucial elements of controlling Delaware law relating to the covenant of good faith and fair dealing and that the court's *own factual findings* that the contract (Partnership Agreement) covered both compensation decisions and the resolution of disputes about compensation conclusively demonstrated that the covenant was inapposite. The petition also contended that the court's finding that the Partnership Agreement in effect when respondent voluntarily retired from the firm required him to retire at the end of 2005 was wholly inconsistent with its finding that he was entitled to seek compensation for 2006.

In response, the Division withdrew its finding that respondent was required by the Partnership Agreement to retire at the end of 2005, stating that the finding was unnecessary to affirm the trial court's summary judgment ruling on the forced retirement claim, which could be affirmed because damages after 2006 were too speculative. App., *infra* 48a-49a. The court did not address the other issues raised in the petition for rehearing. For example, it failed even to discuss SNR's argument that the court's own findings that the Partnership Agreement covered the compensation process "in its entirety" and covered the resolution of disputes about compensation mandated the conclusion under Delaware (and general) law that the implied covenant could not be applied. The court also did not address SNR's

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[5] Respondent subsequently opted for a retrial. Notice of Douglas E. Rosenthal's Election for a New Trial on Damages, CA. No. 2005 CA 007607 B (D.C. Sup. Ct. June 22, 2010).

argument that the express terms of the controlling Partnership Agreement did not allow respondent to be compensated after he voluntarily retired or after 2005, the year in which he reached the then mandatory retirement age.

SNR filed a second petition for rehearing, asserting that it was not only improper, but a violation of due process, for a jury to award damages for 2006, because, *inter alia*, no trier of fact had decided whether the Partnership Agreement required respondent to retire at the end of 2005 and therefore whether SNR was liable for 2006 damages. The court denied the second petition without discussion. App., *infra*, 50a-51a.

REASONS FOR GRANTING THE PETITION

While this Court does not often review decisions from the District of Columbia Court of Appeals, several decisions of this Court make clear that it can and will do so in the exercise of its supervisory authority over that federal court "in exceptional situations where egregious error has been committed." *Pernell v. Southall Realty*, 416 U.S. 363, 369 (1974) (citing *Griffin v. United States*, 336 U.S. 704, 717-718 (1949); *Fisher v. United States*, 328 U.S. 463, 476 (1946)).[6] These cases show that this Court will

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[6] The District of Columbia Court of Appeals is a federal court. *See* District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970) (creating the court); *see also* 28 U.S.C. § 1257 (including the court in the definition of the "highest court of a State" for purposes of certiorari jurisdiction). In *Pernell*, this Court observed that, because of the *federal* nature of both the court and District of Columbia "local law," this Court has jurisdiction, and therefore discretion, to review decisions from the court interpreting the "local law" of the District. *See* 416 U.S. at 368-369 (contrasting the Court's lack of jurisdiction to review state court decisions interpreting state law). In a recent in-chambers

exercise such jurisdiction even if the only questions involved concern local District of Columbia law — which is *not* the situation here.

This case presents just such an exceptional situation. The decision below contains several egregious errors, one involving constitutional due process concerns. These egregious errors, if uncorrected by this Court, will have significant and far reaching effects on our nation's major law firms. The petition for a writ of certiorari therefore should be granted. Indeed, in light of the obvious, indefensible nature of the Court of Appeals' errors, SNR respectfully submits that summary reversal is appropriate.

The Court of Appeals' first egregious error is its nullification of Delaware law concerning the application of the covenant of good faith and fair dealing in the context of law firm decisions as to the compensation of partners. That this question involves Delaware law does not obviate either the need for or the appropriateness of this Court's review. Even where the *sole* issue presented concerns state law (*not* the circumstance here), this Court has been willing to grant review where the matter is of substantial importance. *See Leavitt v. Jane L.*, 518 U.S. 137, 144-45 (1996); *Steele v. Gen. Mills, Inc.*, 329 U.S. 433, 438 (1947); *Wichita Royalty Co. v. City Nat. Bank of Wichita Falls*, 306 U.S. 103, 107 (1939). Indeed, this

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opinion, *Jackson v. District of Columbia*, No. 09A807 (March 2, 2010), Chief Justice Roberts, in denying a stay on a matter of local concern, noted that the parties later may seek Supreme Court review and that the Court's practice of "deferr[ing] to the decisions of the courts of the District of Columbia on matters of exclusively local concern" is "'a matter of judicial policy' -- if not 'judicial power.'" *Id.* at 2 (citing *Whalen v. United States*, 445 U.S. 684, 687 (1980), and *Fisher v. United States*, 328 U.S. 463, 476 (1946)).

Court has said that it "undoubtedly should do so where the alternative is allowing blatant federal-court nullification of state law." *Leavitt*, 518 U.S. at 144-45. As demonstrated below, not only is the Court of Appeals' ruling on the covenant manifestly wrong, as the court's *own factual findings show*, it amounts to a "nullification" of Delaware law.

The decision below invites juries to invade the discretionary compensation decisions of law firms operating with non-formulaic compensation systems. Thus, the decision is of enormous importance to many national and regional law firms, as well as other partnerships, other professional associations, and corporations with similar non-discretionary compensation systems. Those concerns are only heightened because Delaware law as to the covenant is much the same as the law of many jurisdictions[7] and because so many large law firms have offices in the District of Columbia and are Delaware entities.[8]

The second egregious error concerns the application of District of Columbia remedies law. The Court of Appeals allowed respondent, far beyond the "benefit of his bargain," to recover (1) for 2006, when the Partnership Agreement in effect when he left the firm required him to retire at the end of 2005,[9] and (2) for periods after he *voluntarily retired*. Yet, both the Partnership Agreement and overwhelming precedent makes clear that an employee who *voluntarily* retires (as the trial court found respondent had done) is not entitled to compensation for periods

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[7] *See* Section I(B) *infra*.

[8] See note 16, *infra*.

[9] In its initial decision, the Court of Appeals expressly found that the Partnership Agreement required respondent to retire at the end of 2005. App., *infra*, 22a n.12.

following retirement.[10] The District's law governing remedies is federal law, and, as the court below conceded, is no different than the remedies law of Delaware and other States. This Court should not countenance such egregious misapplication of federal law.

The third egregious error implicates fundamental due process principles. This Court has been more inclined to review decisions by the District of Columbia Court of Appeals where, as here, constitutional issues are involved. *See Miller v. United States*, 357 U.S. 301, 306 (1958); *Pernell*, 416 U.S. 363 at 369; *Griffin*, 336 U.S. at 717-718; *Fisher*, 328 U.S. at 476. Here, due process does not allow an award of damages where liability is not, and cannot be, fully and validly established. Damages cannot constitutionally be awarded respondent for 2006 (as the Court of Appeals has allowed) when the controlling Partnership Agreement required him to retire at the end of 2005. Moreover, *no trier of fact ever considered whether the Partnership Agreement's retirement-age provision precluded an award of damages for 2006.* Damages also cannot constitutionally be awarded for periods after respondent voluntarily retired when the controlling Partnership Agreement (the "bargain" he reached) clearly provided for compensation only so long as he worked for the firm. By allowing damages for periods where all elements of liability have not been (and could not be) established, the opinion below violates due process and conflicts with recent decisions of this Court holding that punitive damages cannot be awarded for conduct for which liability has not been found.

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[10] *See* Section II(B) *infra*.

I. THE COURT OF APPEALS NULLIFIED DELAWARE LAW GOVERNING THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING

A. The Court Of Appeals Disregarded Critical Delaware Law Requirements

As the trial court and the parties agreed, Delaware law regarding the covenant applied in this case. Indeed, the agreed-on jury instruction was based, virtually word-for-word, on the leading Delaware case. *See Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434, 441 (Del. 2005). The charge said in part:

> Existing contract terms control . . . such that implied good faith cannot be used to circumvent the parties bargain . . . Thus, one generally cannot base a claim for breach of the implied covenant on conduct authorized by the terms of the agreement.[11]

Accordingly, under Delaware law, if SNR's conduct was authorized by the Partnership Agreement, it cannot be the basis of a claim for breach of the implied covenant of good faith and fair dealing.

The Court of Appeals expressly found that the Partnership Agreement covered both compensation decisions and resolution of compensation disputes. App., *infra*, 24a n.14 (stating that "the Agreement [that respondent] executed *governed his compensa-*

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[11] The charge was consistent with previous Delaware opinions. App., *infra*, 92a-93a. *See, e.g., Dave Greytak Enter., Inc. v. Mazda Motors of Am., Inc.*, 622 A.2d 14, 23 (Del. Ch. 1992) ("[W]here the subject at issue is expressly covered by the contract . . . the implied duty to perform in good faith does not come into play").

tion in its entirety") (emphasis added). The court also said:

> The [firm's Partnership] Agreement vests in the Policy and Planning (P&P) Committee *the authority* to set, and re-adjust every two years, the percentage of net firm income to be earned by each equity partner "in accordance with procedures established from time to time by the P&P Committee. . . .
>
> The Agreement itself listed no criteria by which contract numbers were to be fixed; it left the process for doing so to the P&P Committee. . . .[12]
>
> By signing the Schedule A, [respondent] "re-executed" the Partnership Agreement "as modified" to reflect the "adjustment[] of Schedule A" stating his contract number for the next two years. . . .
>
> *[T]he evident purpose of the Schedule A was to resolve any outstanding compensation disputes rather than to permit later controversy, and possibly lawsuits, challenging the contract numbers.*

Id. at 3a-7a (emphasis added).[13]

Despite these factual findings, the Court of Appeals declined to rule that the covenant was inapposite under Delaware law. Indeed, in its initial deci-

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[12] *See also* App., *infra*, 21a (recognizing "the firm's 'non-formulaic' approach to compensation"). P&P fixed all partners' compensation for the next two year period, even for those, like respondent, who were required to retire during that period. CA App. A-2433, A-2441.

[13] These factual findings were consistent with the record. *See* CA App. A-2446-51.

sion, the Court of Appeals did not even discuss this central, dispositive issue. *See id.* at 52a-84a. SNR noted the inconsistencies between the court's factual findings and its decision on the covenant in its petition for rehearing. Although the court modified a portion of its initial opinion in response to that petition, it once again failed to address the rule that, under Delaware law, the covenant is inapplicable where there is a governing contract. *Id.* at 47a-49a.

The Court of Appeals also disregarded another significant, explicit requirement of Delaware law, namely that the covenant applies only if it is clear from the controlling writing that the parties would have proscribed the conduct at issue had they considered it. *Id.* at 52a-84a. The trial court, quoting the *Dunlap* case, charged the jury as follows: *"Only when it is clear from the writing* that the contracting parties 'would have agreed to pr[o]scribe the act later complained of had they thought to negotiate with respect to that matter' may a party invoke the covenant's protections." App., *infra*, 93a (emphasis added).[14]

In response to SNR's assertion that this portion of the charge was not met, the Court of Appeals, in a footnote, dealt only with SNR's argument that the other partners had ratified the compensation award to respondent.[15] Notably, that footnote does not even

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[14] This principle recently was reaffirmed in *Amirsaleh v. Bd. of Trade*, No. 2822-CC, 2009 Del. Ch. LEXIS 192, at *13-*14 (Del. Ch. 2009) (the covenant applies when "the parties would have bargained for a contractual term proscribing the conduct that allegedly violated the implied covenant had they foreseen the circumstances under which the conduct arose").

[15] *See* App., *infra*, 11a n.6 (rejecting as "fanciful" SNR's argument that "that by signing their own Schedule A's (and 're-executing' thereby the Partnership Agreement) for 2005-2006

attempt to demonstrate that "it is clear from the writing [Partnership Agreement] that the contracting parties [partners] would have agreed to proscribe the act later complained of [the compensation decision concerning respondent] had they thought to negotiate with respect to that matter." Indeed, demonstrating that would have been impossible because nothing in the Partnership Agreement makes that "clear." Certainly, respondent, although repeatedly invited to do so, has pointed to no provision in the Partnership Agreement that provided the requisite clarity.

In its initial rehearing petition, SNR observed, unavailingly, that the Court of Appeals also had ignored this specific, controlling element of Delaware law. While the court modified its opinion somewhat, this portion of the opinion was untouched. The Court of Appeals' continued avoidance of a crucial requirement of Delaware law — an avoidance that effectively results in its nullification — is the type of unacceptable judicial conduct that calls for this Court's review and summary reversal.

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after Rosenthal had left the firm, the other equity partners of SNR all implicitly approved his contract number for that period"). However, the testimony of plaintiff's witness Michael Schlanger, a former SNR partner who never had served on the firm's Policy and Planning Committee, showed that Mr. Schlanger was fully familiar with information relating to respondent's compensation and that of other SNR partners. (CA App. A-2234-39, A-2253, A-2258-59). Mr. Schlanger signed Schedule A and thus "re-executed" the Partnership Agreement as modified by all the Schedule As. CA App. A-2446-51.

B. The Egregious Errors Regarding The Covenant Are Important And Warrant This Court's Review

The Court of Appeals' decision is important. Many large firms, like SNR, have offices in the District of Columbia and are Delaware P.C.s or L.L.P.s.[16] Furthermore, the decision has enhanced significance because: (1) many major law firms, like SNR, have *discretionary*, non-formulaic compensation systems,[17] and (2) Delaware law regarding the covenant is similar to that of many other jurisdictions, thus giving the Court of Appeals' ruling broad precedential implications.

Williston on Contracts, § 63:22, sums up the general law, stating in part:

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[16] Ninety-six of the 2010 AmLaw 100 firms have offices in the District of Columbia. *See* ALM MEDIA PROPS. LLC, 2010 AMLAW 200 (2010). Thirty-one of the 2010 AmLaw 100 firms are Delaware P.C.s or L.L.P.s. *See* Div. of Corps., Dept. of State, *Gen. Info. Name Search*, *available at* https://delecorp.delaware.gov/tin/GINameSearch.jsp. In addition, "[m]ore than 850,000 business entities," including "[m]ore than 50% of all publicly-traded companies in the United States [and] 63% of the Fortune 500 have chosen Delaware as their legal home." Div. of Corps., Dept. of State, State of Del., *About Agency* (May 27, 2010), *available at* http://corp.delaware.gov/aboutagency.shtml. Notably, the U.S. subsidiaries of PricewaterhouseCoopers LLC, Deloitte & Touche LLP, Ernst & Young US LLP, and KPMG LLP all are Delaware entities.

[17] *See, e.g.*, Joel A. Rose, *Partner Compensation and Performance Standards*, COMP. & BENEFITS FOR L. OFFICES (Inst. of Mgmt. & Admin. June 2010) (stating that in the "overwhelming majority" of "the more financially and professionally successful law firms . . . formal weighting is not applied to . . . compensation standards, nor is an arithmetical or formula-driven approach to analyzing these standards applied").

> As a general principle, there can be no breach of the implied promise or covenant of good faith and fair dealing where the contract expressly permits the actions being challenged, and the defendant acts in accordance with the express terms of the contract. ... *This is so even where the contractual provision at issue is one that purports to grant to the defendant absolute discretion* to take certain actions or engage in certain conduct under the contract; such a provision, stated simply, permits the defendant substantial latitude, and as long as the discretion is exercised as permitted under the contract, and *without evident bad faith motive or malice*, its exercise cannot be a breach of the more general implied promise of good faith and fair dealing.

23 WILLISTON ON CONTRACTS § 63:22 (4th ed. 2000) (emphasis added). This is fully in line with settled Delaware law, which contrary to the Court of Appeals' characterization, App., *infra*, 8a-11a, 20a-21a, requires a showing of bad faith or malice before the covenant can be applied. *See Amirsaleh*, 2009 Del. Ch. LEXIS 192, at *17-*18 (holding that "to prove a breach of the implied covenant plaintiff must demonstrate that defendants acted in 'bad faith'").[18]

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[18] It is established that SNR was not acting with "bad faith motive or malice." The Court of Appeals, observing that, to show a breach of the implied covenant, Delaware law requires "proof of arbitrary or unreasonable conduct, not more," held in denying punitive damages that the record was "far from evincing evil motive, actual malice, or willful disregard of [respondent's] rights." App., *infra*, 20a-21a.

In *Roan v. Keck, Mahin & Cate*, 962 F.2d 10 (table), 1992 WL 104789, at *6 (7th Cir. May 19, 1992), the Seventh Circuit declined to apply the covenant under closely analogous circumstances. It affirmed the district court's holding that "determinations made in accordance with the law firm [partnership] agreement would not be subject to legal challenge under some unspecified standard of fairness." *See also La Quinta Corp. v. Heartland Props. LLC*, 603 F.3d 327, 338 (6th Cir. 2010) ("[W]here the contracting party complains of acts of the other party that are specifically authorized in their agreement, we cannot see how there can be any breach of good faith and fair dealing") (quoting *M&I Marshall & Ilsley Bank v. Schlueter*, 655 N.W.2d 521, 525 (Wis. App. 2002)); *Precision Pine & Timber, Inc. v. United States*, 596 F.3d 817, 831 (Fed. Cir. 2010) ("The implied duty of good faith and fair dealing cannot . . . create duties inconsistent with the contract's provisions."); *Pepsi-Cola Bottling Co. of Pittsburg, Inc. v. PepsiCo, Inc.*, 431 F.3d 1241, 1261 (10th Cir. 2005) ("courts are not at liberty to impose obligations under the guise of the implied covenant which are inconsistent with the terms of the contract") (citation omitted); *Yarborough v. DeVilbiss Air Power, Inc.*, 321 F.3d 728, 733 (8th Cir. 2003) (no implied good faith obligation "where the parties have unmistakably expressed their respective rights"); *Times Mirror Magazines, Inc. v. Field & Stream Licenses Co.*, 294 F.3d 383, 395 (2d Cir. 2002) (parties "cannot avoid the express terms of the contract by relying on the implied covenant of good faith and fair dealing"); *Burger King Corp. v. Weaver*, 169 F.3d 1310, 1318 (11th Cir. 1999) ("a cause of action for breach of the implied covenant cannot be maintained ... in derogation of the express terms of the underlying contract"); *Clark v. America's Favorite Chicken Co.*, 110

F.3d 295, 297 (5th Cir. 1997) (holding that "the implied obligation to execute a contract in good faith usually modifies the express terms of the contract and should not be used to override or contradict them") (citation omitted).[19]

The Court of Appeals' decision conflicts with these decisions and essentially stands alone in its misapplication of the covenant. But its decision, which was well-publicized in legal circles,[20] is likely to lead to both litigation and confusion in future disputes concerning law firm compensation. Review by this Court is therefore warranted.

II. THE COURT OF APPEALS HAS EGREGIOUSLY MISAPPLIED DISTRICT OF COLUMBIA REMEDIES LAW

The trial court determined that respondent voluntarily retired from SNR on July 31, 2005. App., *infra*, 92a. It also held that respondent could not recover damages for periods after his voluntary retirement. *Id.* at 39a-40a. The Court of Appeals did not disturb the finding that respondent voluntarily retired. *Id.* at 12a. Rather, it ruled as a matter of

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[19] *See also, e.g., Clalit Health Servs. v. Israel Humanitarian Found.*, 395 F. Supp. 2d 21, 23 (S.D.N.Y. 2005); *Farris v. Hutchinson*, 838 P.2d 374, 376-77 (Mont. 1992); *Carma Developers (Cal.), Inc. v. Marathon Dev. Cal.*, 826 P.2d 710, 728 (Cal. 1992); *Exxon Corp. v. Atlantic Richfield Co.*, 678 S.W.2d 944, 947 (Tex. 1984); *Magnan v. Anaconda Indus., Inc.*, 479 A.2d 781, 786 (Conn. 1984).

[20] *See, e.g.*, Ross Todd, *Former Sonnenschein Partner Gets Second Shot at Fee Dispute*, THE AMLAW DAILY (Jan. 5, 2010), *available at* http://amlawdaily.typepad.com/amlawdaily/2010/01/ex-sonnenschein-partner.html; Leigh Jones, *Former Partner Gets a Second Shot at Sonnenschein in Fees Dispute*, THE NAT'L L.J. (Jan. 6, 2010), *available at* http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202437415539.

law that respondent could seek damages for periods *after* he voluntarily retired. The court said he was entitled to cease performing under the contract (Partnership Agreement) and to receive the "benefit of the bargain" into which he entered, concluding that "the voluntariness or not of his departure is something we need not decide." *Id.*

The Court of Appeals seriously misapplied District of Columbia remedies law in not perceiving that respondent's "bargain" was that he would be compensated only while he worked for SNR. Upon a breach of the covenant, he was entitled to stop work and to sue for damages for the time he worked at the firm after the breach. But respondent was not entitled voluntarily to stop work and sue for subsequent periods because the Partnership Agreement (his bargain) undisputedly established that he was entitled to compensation only while he worked and that, after he ceased work, he was entitled only to certain limited retirement benefits. *Id.* at 88a-89a at ¶ 6.1 ("In the event of the . . . retirement . . . of an Equity Partner . . . there shall be paid to the person or persons designated in the latest writing delivered to the partnership" the following outlined benefits.).

The conclusion that respondent is not entitled to compensation for periods after voluntary retirement is consistent with the familiar principle that, notwithstanding a material breach, an injured party remains bound by a contract, if the injured party continues to perform in accordance with that contract after the breach. *See* 14 WILLISTON ON CONTRACTS § 43:15 ("conduct [after breach] indicating an intention to continue the contract in effect constitutes a conclusive election, in effect waiving the right to assert that the breach discharged any obligation

to perform").[21] Respondent remained at the firm (and collected compensation) for seven months after SNR's purported breach, CA App. A-6355-56, and thus remained bound by the Partnership Agreement. Under that Agreement, he forfeited any right to compensation after July 31, 2005, when he voluntarily retired from the firm.

The Court of Appeals' decision also conflicts with overwhelming precedent — whether based on breach of contract, constitutional violation or discrimination — holding that a wronged plaintiff is *not* entitled to compensation after voluntary retirement. *See Adler v. John Carroll Univ.*, 549 F. Supp. 652, 656 (N.D. Ohio 1982) (Title VII and breach of contract); *Alicea Rosado v. Garcia Santiago*, 562 F.2d 113, 120 (1st Cir. 1977) (violation of constitutional rights); *Hertzberg v. SRAM Corp.*, 261 F.3d 651, 659 (7th Cir. 2001) (holding that an employee who "leaves his or her employment as a result of . . . discrimination must show either an actual or constructive discharge in order to receive" back pay);[22] *Mallinson-Montague v. Pocrnick*, 224 F.3d 1224, 1237 (10th Cir. 2000) (stating that an employee must have been constructively discharged to be entitled to a back pay award); *Durham Life Ins. Co. v. Evans*, 166 F.3d 139, 155 (3rd Cir. 1999) ("Title VII allows back pay awards when an employee does not leave her employment voluntarily."); *Jurgens v. EEOC*, 903 F.2d 386, 389

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[21] *See, e.g., Accusoft Corp. v. Palo*, 237 F.3d 31, 55-56 (1st Cir. 2001) (injured party, whose "conduct indicate[s] a willingness to continue to honor a contract," is bound by the contract); *Apex Pool Equip. Corp. v. Lee*, 419 F.2d 556, 562 (2d Cir. 1969) ("If the injured party chooses to go on," he "continu[es] the contract.").

[22] There was no constructive discharge in the present case, but rather voluntary retirement. App., *infra*, 92a.

(5th Cir. 1990) ("[I]t is well settled in this circuit that, in order for an employee to recover back pay for lost wages beyond the date of his retirement or resignation, the evidence must establish that the employer constructively discharged the employee."); *Major v. Rosenberg*, 877 F.2d 694, 695 (8th Cir. 1989) (holding that, when an employee resigns, he is "entitled to awards of back pay . . . only if" he was "constructively discharged"); *Gomez v. Great Lakes Steel Div. Nat'l Steel Corp.*, 803 F.2d 250, 256 (6th Cir. 1986) ("If there was no actionable constructive discharge, Gomez cannot recover for those losses directly attributable to his voluntary decision to retire"); *Kirsch v. Fleet Street, Ltd.*, 148 F.3d 149, 168 (2d Cir. 1998) ("the backpay period ends prior to judgment if the plaintiff has theretofore retired"); *Clark v. Marsh*, 665 F.2d 1168, 1172 (D.C. Cir. 1981) (Title VII plaintiff entitled to damages "for the period subsequent to her retirement" *only if* the court determined that the plaintiff had been constructively discharged); *Wis. Ave. Nursing Home v. D.C. Comm'n on Human Rights*, 527 A.2d 282, 292 (D.C. 1987) (stating, *inter alia* that "a voluntary termination of employment represents a choice to incur a loss of earnings").[23]

The Massachusetts and New Jersey cases cited by the court to support its position did *not* involve voluntary retirements, but rather *constructive or actual discharges. See Kass v. Brown Boveri Corp.*, 488 A.2d 242, 245 (N.J. Super. Ct. App. Div. 1985) (employer's "attempt to reclassify plaintiff to a lesser job

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[23] The Court of Appeals distinguished the *Wisconsin Avenue Nursing Home* case as concerning "employment discrimination, not a breach of contract," without explaining why that distinction has any relevance in determining the measure of damages. App., *infra*, 13a-14a.

status constructively discharged him in violation of his employment contract"); *Ward v. Am. Mut. Liab. Ins. Co.*, 443 N.E.2d 1342, 1344 (Mass. App. Ct. 1983) (case involved "defendant's wrongful discharges of the plaintiffs").[24]

The Court of Appeals' ruling in this regard, coupled with its misapplication of Delaware law discussed above, may work to the great disadvantage of the nation's law firms. Read together they mean that a partner — disgruntled with his compensation where the partnership agreement establishes a non-formulaic, discretionary compensation system — can quit the firm, sue for breach of the covenant claiming unfairness, and seek compensation for future periods, even if the partnership agreement provides that he will not be compensated if not working for the firm. That is distinctly not the law in other jurisdictions. It should not be the law in the District of Columbia.

Moreover, by allowing respondent to seek 2006 compensation, the Court of Appeals gave him *more* than his bargain. As discussed in detail in Section III, and as that court initially found, the Partnership

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[24] The Court found it "hard to imagine that the firm would have allowed [respondent] to remain a partner once he sued it." App., *infra*, 13a. However, for wronged plaintiffs to remain employed while they sue is not unique. *See, e.g., EEOC v. Kelley Drye & Warren, LLP*, No. 1:10-cv-00655-LTS-MHD (S.D.N.Y. filed Jan. 28, 2010) (EEOC suing on behalf of partner still with firm); *Thorne v. City of El Segundo*, 802 F.2d 1131, 1134 (9th Cir. 1986) ("An employee, faced with an obstacle in the logical progression and development of a career should not quit at the first sign of institutional discrimination. Restricting back pay awards encourages the employee to work with supervisors within the existing job setting and employment relationship in an effort to overcome resistance within that workplace and to eradicate the discrimination.").

Agreement in effect when respondent left SNR required him to retire at the end of 2005. To allow him damages for 2006, a year for which he had no right to compensation, was yet another egregious misapplication of District of Columbia remedy law.

This Court periodically has affirmed its "judicial power" to review decisions of the District of Columbia Court of Appeals concerning local law matters "in exceptional situations where egregious error has been committed." *Pernell*, 416 U.S. 363 at 369. *See also Griffin*, 336 U.S. at 717-718; *Fisher*, 328 U.S. at 476. The Court is particularly prone to do so where (as here) the decision has ramifications "not confined to the Potomac's shores, but reaching far beyond." *Gen. Motors Corp. v. Dist. of Columbia*, 380 U.S. 553, 556 (1965). This judicial power, we respectfully submit, would be well used to review (and summarily reverse) the aberrant decision here that blatantly ignores both the underlying facts and overwhelming precedent.

III. THE COURT OF APPEALS' DECISION VIOLATES FUNDAMENTAL DUE PROCESS PRINCIPLES

In addition to grossly misapplying District of Columbia remedies law, the Court of Appeals' allowance of 2006 damages violates fundamental due process principles. That court expressly left open the factual question (after initially resolving it conclusively in SNR's favor) of whether respondent was required to retire at the end of 2005 under the Partnership Agreement, which at the time mandated retirement at age 65. As explained below, that question was never resolved by the trial court or submitted to the jury; nor has any trier of fact determined whether the retirement age provision precluded an award of 2006 damages, when respondent had no

right to employment or compensation. Thus, critical issues going to SNR's liability for 2006 have not been resolved — and, indeed, could not be resolved in respondent's favor. Due process is also violated by allowing damages for any period after respondent's voluntary retirement (July 31, 2005) beyond which, under the Partnership Agreement, he had no right to compensation.

This Court's cases make clear that due process requires that all elements of a liability claim be proven before damages can attach. The Court of Appeals' disregard of this bedrock principle is untenable and requires this Court's review and summary reversal.

A. Due Process Precludes The Imposition Of Damages Without A Finding Of Liability

Precedent from this Court and others establish that all elements of an underlying claim of liability must be proven before damages are awarded. *See Farrar v. Hobby*, 506 U.S. 103, 120 (1992) ("*Every* nominal damage award has as its basis a finding of liability.") (citation omitted); *Rathjen v. Litchfield*, 878 F.2d 836, 842 (5th Cir. 1989) (holding that "liability is a *sine qua non* of a damage award"); *Gibson v. Am. Cyanamid Co.*, No. 07-C-864, 2010 U.S. Dist. LEXIS 59378, at *58 (E.D. Wis. June 15, 2010) (holding that "it violates due process when there is no nexus or provable connection between a damages award and the harmful conduct of the defendant").

Recently, this Court twice has held that due process precludes the imposition of punitive damages for acts for which liability has not been found. *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). In *State Farm*, this Court held: "Due

process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant." *State Farm*, 538 U.S. at 423. The defendant must be found liable for an actual claim; otherwise, a damages award is "an irrational and arbitrary deprivation of the property of the defendant." *Id.* at 429.

In *Philip Morris*, this Court held that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . ., *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." 549 U.S. at 353. Imposing damages for acts for which the defendant had not been found liable "would amount to a taking of 'property' from the defendant without due process." *Id.* at 349.

State Farm and *Philip Morris* thus establish that it violates due process to impose punitive damages for acts for which liability has not been established. So also does due process preclude the imposition of a compensatory damages award unsupported by a finding of liability.

Other cases show that due process does not allow the government or a court to deprive a person of property without a prior proper judicial determination based on sufficient evidence that such deprivation is justified. *United States v. $8,850,* 461 U.S. 555, 562 n.12 (1983) (stating that "[t]he general rule, of course, is that absent an 'extraordinary situation' a party cannot invoke the power of the state to seize a person's property without a prior judicial determination that the seizure is justified") (citing *Boddie v. Conn.*, 401 U.S. 371, 378-379 (1971)). *See also Fuentes v. Shevin,* 407 U.S. 67, 96 (1972) (prejudgment replevin provisions held unconstitutional be-

cause they permitted "deprivation of property without due process of law"); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337, 343 (1969) ("[D]ue process is afforded only by the kinds of 'notice' and 'hearing' . . . [that establish] the underlying claim . . . *before* . . . depriv[ation] of . . . property") (emphasis in original).

B. The Court Of Appeals Imposed Damages Although Critical Elements Of The Underlying Liability Claim Were Unresolved

The Court of Appeals, in its *amended* opinion, expressly left open the question of whether the Partnership Agreement's mandatory retirement age requried respondent to retire at the end of 2005. In its *first* opinion, it found that the record established that the retirement age was 65 and that respondent, who turned 65 in February 2005, CA App. A-1462-63, was required by the Partnership Agreement to retire at the end of 2005. App., *infra* 22a n.12. The court said:

> [T]he record ... supports summary judgment to SNR on this issue because it demonstrates, and Rosenthal does not dispute, that in 1999 the equity partners voted, by the required three-fourths margin under the Agreement, to change the retirement age to 65. Rosenthal almost certainly knew of that change because in late 2004, when he was purportedly told he would have to retire by the end of 2005, he did not question the decision but instead asked for a one-year extension of the date. And no evidence was proffered that the partners had rescinded the change of age by the time Rosenthal left the firm. . . .

App., *infra*, 74a-75a. These conclusions were fully supported by the record. CA App. A-6371-72.

Because respondent had to retire at the end of 2005, he had, under the then-existing Partnership Agreement, the right to receive compensation only until then — and not in 2006. Nonetheless, as explained above, the Court of Appeals also allowed respondent damages for 2006, purportedly to give him the "benefit of [his] bargain." App., *infra*, 12a.

In its first petition for rehearing, SNR contended that the Court of Appeals' initial decision was internally inconsistent, and that, as the Partnership Agreement shows and that court expressly found, respondent had "bargained" for compensation only through the end of 2005. Apparently recognizing that its opinion was inconsistent, the Court of Appeals reversed course. Its March 18 Order withdrew the above-quoted passage and substituted a footnote that reads:

> Our original opinion in this case concluded that summary judgment was also proper on the claimed breach of the retirement clause because undisputed evidence showed that, under a 1999 amendment of the Partnership Agreement, Rosenthal was obligated to retire at age 65. On further reflection in light of SNR's petition for rehearing and the opposition thereto, we now conclude that the evidence is not one-sided on whether Rosenthal, had he not become SNR's adversary by suing it, would have had to retire at age 65 or, instead, could have remained with the firm under a then-pending revision of the Agreement eliminating the mandatory retirement age. But that issue is a moot one because, as stated

> in the text, Rosenthal furnished the trial court with no yardstick by which his damages for the alleged breach of the retirement clause could reasonably be calculated, and on that ground alone summary judgment was correctly entered against him on the claim.[25]

App., *infra*, 48a-49a (emphasis added).

This language, and the withdrawal of the passage in its initial opinion, expressly leave open the critical issue of whether respondent, at the time of the breach and when he left SNR, was subject to mandatory retirement at the end of 2005. Nonetheless, the Court of Appeals still ruled that respondent is entitled to seek damages for 2006. *Id.* at 30a-31a. Its withdrawal of its fully-supported finding of mandatory retirement at age 65, evidently because that finding did not comport with its damage finding, is the type of egregious decision-making that brings disrespect to the rule of law and that this Court, under its precedents, should review.

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[25] In arguing to the trial court (successfully) that respondent voluntarily retired, SNR noted that he was told that the Partnership Agreement might be amended to remove the retirement age, and if that occurred, he would not be required to retire at the end of 2005. *But he voluntarily retired anyway in July 2005.* App., *infra*, 92a. That the Partnership Agreement later was so amended does not change the basic, critical fact — which the Court of Appeals recognized in its initial opinion — that, when respondent "left the firm," he had the right under the Partnership Agreement to work only to the end of 2005. *Id.* at 22a n.12. He cannot now take advantage of an amendment that occurred *after he left the firm* to contend he could have worked in 2006. Whatever rights he had under the Partnership Agreement (his "bargain") were those provided by its terms when he departed SNR.

C. Critical Elements of Respondent's Liability Claim Were Not Resolved At Trial

No trier of fact has resolved the question whether the Partnership Agreement required respondent to retire at the end of 2005 and thus precluded damages for 2006. The trial judge did not resolve this critical question. Rather, after he ruled that respondent voluntarily retired in July 2005, he repeatedly and expressly concluded that the retirement age was "irrelevant" to all other issues in the case, *including damages*. For example, when respondent's counsel inquired whether the trial court had determined whether the Partnership Agreement had been validly amended to force retirement at age 65, rather than 70, the court stated:

> In my view the motion for summary judgment doesn't hinge on whether or not [the Partnership Agreement] was [amended] or not . . . Clearly there was a dispute as to whether or not it was amended and accepted . . . In essence, my finding on this issue that he resigned . . . has absolutely nothing to do with the amendment, because I find that . . . *it is irrelevant in terms of the legal responsibility that SNR owed to Mr. Rosenthal.*

CA App. A-760 (emphasis added).

On several other occasions, the trial judge ruled that the retirement age was "irrelevant" and "not in the case." For example, he stated that the issue "of having to retire because of age is out of the case. I have ruled that that's not in the case." *Id.* at A-2564-65. Similarly, when the jury sent him a note during deliberations asking to be "directed to an admitted document that . . . changes the retirement age to 65," *id.* at A-3575, the trial judge again ex-

pressed his view to the parties that "[w]hether the retirement age is 65 or 70 is *irrelevant* to the decision they have to make." *Id.* at A-3576 (emphasis added).[26]

Thereafter, respondent's counsel suggested to the trial judge that the jury "could be focusing on the issue of damages" and that the jury "could be considering [when] Mr. Rosenthal's damages should [be] cut off" and whether he could receive damages "for a period after he was 65 because he would have had to retire then anyway." *Id.* at A-3585. The trial judge rejected that concept "because I have already instructed them [that] they are supposed to consider the contract years . . . 2005-2006 without regard to age." *Id.* He specifically refused to give an additional instruction regarding the relationship of the retirement age and damages, stating: "Well, I will simply not do that because the question has nothing to do with damages whatsoever." *Id.* at A-3585.

Eventually, the trial court advised the jury that the court could not direct it to any document or evidence. It also advised the jury that the court had ruled that respondent voluntarily retired from the firm on July 31, 2005, and that the jury could not make any determination that contradicts this finding. CA App. A-3588.

Because the trial judge deemed the matter "irrelevant" and "not an issue in this case," he declined to decide and the jury was not allowed to consider whether the Partnership Agreement's retirement provision would have required respondent to retire

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[26] SNR's counsel noted to the trial court that "there were documents that might have answered that question that were not admitted because the Court ruled that this issue was not an issue." CA App. A-3578.

at the end of 2005 or whether it precluded damages for 2006.

D. The Due Process Violations Warrant This Court's Review

As this discussion demonstrates, the Court of Appeals has allowed respondent to seek damages for 2006 where (1) no trier of fact considered whether the Partnership Agreement in effect when he left the firm precluded him from compensation for 2006, and (2) the evidence plainly shows that it did. As this Court's cases demonstrate, to award damages for a year for which liability has not been, and could not be, validly established is egregious error not consistent with due process or the most basic precepts of the rule of law.

Similarly, as also demonstrated, the Partnership Agreement established conclusively that respondent was not entitled to compensation after he voluntarily retired. Because liability for the post-retirement period cannot be established, due process also disallows damages for that period.

Even without these due process violations, there are ample reasons to review and summarily reverse the manifestly misguided ruling of the District of Columbia Court of Appeals. That these troubling due process issues exist gives this Court yet more grounds to exercise its judicial power to do so. *Pernell*, 416 U.S. 363 at 369; *Griffin*, 336 U.S. at 717-718; *Fisher*, 328 U.S. at 476.

CONCLUSION

For all the reasons set forth above, the petition for a writ of certiorari should be granted and the challenged rulings of the District of Columbia Court of Appeals summarily reversed.

Respectfully submitted,

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August 2010

APPENDIX A

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Decided: December 24, 2009

Nos. 08-CV-1003 & 08-CV-1056

DOUGLAS E. ROSENTHAL and CONSTANTINE CANNON, LLP,

Appellants/ Cross-Appellees,

v.

SONNENSCHEIN NATH & ROSENTHAL, LLP,

Appellee/Cross-Appellant.

Appeal from the Superior Court
of the District of Columbia

Before BLACKBURNE-RIGSBY and OBERLY, Associate Judges, and FARRELL, Senior Judge.

FARRELL, *Senior Judge:*

These consolidated appeals present a welter of issues arising from a dispute over the compensation that a law partner was owed by his firm for work done chiefly on behalf of parties claiming damages from the Libyan government for the destruction of Pan Am Flight 103 over Lockerbie, Scotland in 1988.

Appellant/cross-appellee Douglas E. Rosenthal (hereafter Rosenthal) was awarded more than $ 3.7 million in compensation by a Superior Court jury for breach of the implied covenant of good faith and fair

dealing by his former law firm, Sonnenschein Nath & Rosenthal (hereafter SNR).[1] Rosenthal appeals, arguing mainly (though not only) that the trial judge erroneously reduced the damage award because Rosenthal had retired from SNR during one of the two relevant contract periods of employment. SNR, as cross-appellant, counters that Rosenthal is precluded from challenging his compensation for the first of the relevant contract periods because he agreed to accept the compensation number at the time; and, as to the, second period, argues that the evidence failed to support a cause of action for breach of the implied covenant under governing Delaware law. For its part, SNR won damages of $ 300,000 from the same jury from Rosenthal and his new employer, the law firm Constantine Cannon, LLP, for tortious interference with SNR's retainer agreement with a former client and the firm's entitlement to $ 1.6 million in attorney fees resulting from the Libya litigation.

We hold that Rosenthal could not properly recover for the first employment period in question (2003-2004), but that the jury's sizable award of damages for the second period (2005-2006) is supported by the evidence. Moreover, the trial judge erred, as to that period, by reducing the damage award to the extent of compensation Rosenthal would have been entitled to from SNR had he not retired from the firm. At the same time, the judge erred prejudicially in limiting Rosenthal's proof of the compensation he should have received during the 2005-2006 period, which entitles him to a new trial on compensatory damages. For that reason, we will order the unusual but permissible disposition of

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[1] The "Rosenthal" in the firm name is not Douglas E. Rosenthal.

permitting Rosenthal to elect on remand between a new trial on damages and acceptance of the jury verdict reduced as required by our decision. *See D.C. Code § 17-306* (2001) (court of appeals on review may "direct the entry of such appropriate order ... or require such further proceedings ... as is just in the circumstances"). Finally, we reverse the judgment holding Rosenthal and Constantine Cannon liable for tortious interference, because that suit amounted to a claim for wrongful involvement in litigation and SNR did not meet the requirements as a matter of law for that cause of action.

I.

In 1993, Rosenthal and others filed a law suit against the nation of Libya for its role in the destruction of Pam Am Flight 103 on behalf of families of persons lost in the disaster. In 1994, Rosenthal joined SNR as an equity partner in the firm's Washington, D.C. office and continued to pursue the Libya litigation along with his other work. According to the firm's 1995 Partnership Agreement (hereafter "the Agreement"), which Rosenthal signed, each equity partner receives a percentage of the firm's annual income. The Agreement vests in the Policy and Planning (P&P) Committee the authority to set, and re-adjust every two years, the percentage of net firm income to be earned by each equity partner "in accordance with procedures established from time to time by the P&P Committee." At the relevant times, a partner's compensation for a given two-year period was determined by a two-step process: first by setting a "contract number," which was the base profit share for each partner at the beginning of the two-year period, then by decreasing or increasing this number at the end of each year to reflect the firm's actual financial performance for that year. At trial,

the parties disputed the relative importance, under criteria adopted by the P&P Committee, of factors such as collections, billable hours, and how billing was credited for contingent fee cases (such as the Libya litigation) in setting contract numbers.

The relative weight of these factors was important[2] because, in late 2003, the Libya case settled and over the next year SNR received an aggregate of nearly $ 18 million in attorney fees from the case. The P&P Committee set Rosenthal's contract number at $ 800,000 for the 2005-2006 contract period, compared to his $ 325,000 contract number for the previous period of 2003-2004. Believing this to be an inadequate reflection of his work leading to the Libya fee collection and his other work in the past two years, Rosenthal sought reconsideration of the proposed compensation by the P&P Committee, unsuccessfully.

Rosenthal left SNR at the end of July 2005 and subsequently joined Constantine Cannon, LLP. In September of that year he filed suit against SNR in Superior Court, alleging, *inter alia,* breach of the Agreement's implied covenant of good faith and fair dealing in the determination of his contract numbers for 2003-2004 and 2005-2006. The trial judge instructed the jury on the definition of this covenant under Delaware law,[3] and the jury returned a verdict for Rosenthal on that count, awarding him damages of $ 3,730,000. Specifically, it found that he was

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[2] Or at least the jury could so find, although SNR strenuously asserted that its determination of contract numbers was holistic and "non-formulaic."

[3] A 2003 amendment to the Agreement provides that "[t]his Partnership Agreement and the partnership shall be governed by the laws of the State of Delaware."

entitled to receive $ 500,000 for each year for the 2003-2004 period, and $ 1,365,000 for each year of 2005 and 2006. On the other hand, the jury found for SNR on its counterclaim alleging tortious interference by Rosenthal and Constantine Cannon, and awarded SNR $ 300,000 on that claim.

After both parties filed motions to amend the judgment, the trial judge reduced Rosenthal's damage award to $ 365,639, reflecting (1) compensation actually received by Rosenthal from SNR and Constantine Cannon during the relevant periods, and (2) the judge's conclusion that Rosenthal was not entitled to damages for the period after what the judge had ruled to be his voluntary retirement from SNR.[4] The judge also deducted the $ 300,000 in damages awarded to SNR, resulting in a final judgment of $ 65,639 for Rosenthal and against SNR.

II.

SNR, in its cross-appeal, challenges Rosenthal's entitlement to any damages for the 2003-2004 contract period because, after the P&P Committee set his contract number for that period, he signed a "Schedule A" form stating that number and thereby agreed to the base compensation amount for the succeeding two years. The trial judge denied summary judgment on this point, believing that Rosenthal's signature on the form only acknowledged the contract number the firm was proposing and did not constitute acceptance of it. We think SNR's position is the only one fairly supported by the record.

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[4] The judge had earlier granted summary judgment to SNR on Rosenthal's claim for breach of the Agreement's mandatory retirement clause, concluding as a matter of undisputed fact that he had retired voluntarily from the firm.

SNR's practice, following determination of an equity partner's contract number for the next two years, was to circulate a Schedule A form for the partner to sign pursuant to Section 3.7 of the Partnership Agreement. That section provided:

> [E]ach Equity Partner shall receive ... the percentage of Net Income to Equity Partners . . . stated in Schedule A . . . as changed from time to time in accordance with this agreement, each initialed for identification by the Equity Partner whose percentage of Net Income ... is therein stated ....

The Schedule A form itself listed the partner's percentage of firm income and stated:

> By executing this Schedule A, I also confirm that I have received a copy of the SNR Amended and Restated Partnership Agreement made as of January 1, 1995, and I hereby re-execute said Agreement as modified by subsequent additions and withdrawals of Equity Partners and adjustment of Schedule A in accordance with the terms of said Agreement.

The undisputed testimony at trial was that, to remain an equity partner at the firm, each equity partner had to sign Schedule A for the next two-year period. Accordingly, Rosenthal signed the Schedule A in 2002 for the succeeding two years. (He did not sign one in 2004, however, because the firm was considering a new partnership agreement and thus the schedules were not circulated until after he left the firm in 2005).

Rosenthal argues that SNR, as a law firm, certainly knew how to draft an express waiver of any challenge to the contract number if that had been the intent behind the Schedule A. While that is true - there is a certain periphrastic quality to the language in the Agreement and the Schedule A itself setting forth its meaning and effect - the consequence of Rosenthal's signing the schedule allows for no reasonable doubt. By signing the Schedule A, he "re-executed" the Partnership Agreement "as modified" to reflect the "adjustment[] of Schedule A" stating his contract number for the next two years. That number thus effectively became a term of the Agreement he accepted by signing the incorporated schedule.

In his deposition testimony, read into the record at trial, Rosenthal recognized that by signing the Schedule A he was "committing myself to the . . . compensation arrangement ... for me as set forth in this Schedule A ... and this is my agreement to accept that compensation level in each of these two-year periods." Elsewhere he testified that by signing Schedule A he "reaffirm[ed]" his "understand[ing]" of what he would be paid for the next two years, even if he did not consider this to be "fair and reasonable." Where, as here, an equity partner's continued employment by the firm was conditioned on his signing the schedule, it makes no sense to argue, as Rosenthal does, that SNR merely wanted an "acknowledgment" of its proposed contract numbers without any greater legal effect. Instead, the evident purpose of the Schedule A was to resolve any outstanding compensation disputes rather than to permit later controversy, and possibly lawsuits, challenging the contract numbers. Rosenthal is thus foreclosed from disputing the contract number for 2003-2004 that he accepted.

III.

SNR is on considerably weaker footing in arguing that judgment as a matter of law should have been entered in its favor for the 2005-2006 contract number. That argument presents a straightforward question of sufficiency of the evidence, and the law is settled that unless no reasonable juror could have found in favor of the verdict the jury reached, it must be sustained. *See, e.g., Dyer v. William S. Bergman & Assocs., 657 A.2d 1132, 1136 (D.C. 1995).* The trial judge instructed the jury on breach of the implied covenant of good faith and fair dealing under Delaware law, quoting for the jury the Delaware Supreme Court's most recent exposition of the covenant in *Dunlap v. State Farm Fire & Cas. Co., 878 A.2d 434 (Del. 2005).* There, the court explained that resort to the implied covenant - which "attaches to every contract" - is a "quasi-reformation" of the contractual agreement itself and thus "should be a rare and fact-intensive exercise, governed solely by issues of compelling fairness." *Id. at 442* (internal quotation marks and citations omitted). But, while stressing caution in application of the covenant, the court did not define it in the crabbed manner SNR advocates in its brief when it argues (for example) that the conduct at issue must have "involved fraud, deceit, or misrepresentation" to be a breach of the covenant. *See* Br. for SNR at 31 (citations omitted).[5] Rather,

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[5] A single-judge decision of the Court of Chancery of Delaware, *Continental Ins. Co. v. Rutledge & Co., 750 A.2d 1219 (Del. Ch. 2000)*, so held ("The Delaware Supreme Court has explicitly held that claimant must demonstrate that the conduct at issue involved fraud, deceit or misrepresentation in order to prove a breach of the implied covenant."). But the *Dunlap* decision, discussed in the text, implicitly rejects so narrow an understanding of the doctrine in Delaware. The decision in *Merrill v. Crothall-American, Inc., 606 A.2d 96 (Del. 1992)*,

Dunlap explains - and the trial judge here instructed - that the implied covenant requires a contracting party "to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party ... from receiving the fruits of the bargain"; it subjects to liability parties whose conduct "frustrates the overarching purpose of the contract by taking advantage of their position to control implementation of the agreement's terms"; and Delaware law recognizes "the occasional necessity of implying contract terms to ensure [that] the parties' reasonable expectations are fulfilled." *Dunlap, 878 A.2d at 442* (citations and internal quotation marks omitted).

Viewed in the light most favorable to Rosenthal, the evidence he presented allowed the jury to find that SNR's conduct in setting his contract number for the 2005-2006 period was an unevenhanded, and thus unreasonable, application of the firm's criteria for setting compensation by decisionmakers (the P&P Committee) who were in a "position to control implementation of the Partnership Agreement's terms." The Agreement itself listed no criteria by which contract numbers were to be fixed; it left the process for doing so to the P&P Committee. As mentioned, the parties presented conflicting evidence about the importance that individual considerations - such as collections and billable hours during the previous years - were intended to play in the determination. SNR highlighted the P&P Committee's written statement of compensation policy which expressly made the contract number decision "non-formulaic," one that took into account. a "wide range

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on which the Chancery Court judge had relied, involved a claim of deceptive inducement of another to enter into an employment contract - a form of breach of the implied covenant that by definition would implicate deceit or fraud.

of quantitative and qualitative factors." But Rosenthal countered with evidence that the written policy stressed collections and billable hours by stating that "'billing credit,' realization and billable hours are the three [factors] featured and emphasized ... in the reports specially prepared for [P&P] for use in the contract process." Moreover, Rosenthal's expert witness accountant, Michael Napolitano, had reviewed SNR equity partner compensation data and found a positive correlation between collections and future compensation - indeed, he said, "the higher the collection amount, the higher the correlation of compensation to collections" was for the years he reviewed. Evidence further allowed the jury to find that SNR generally did not treat (infrequent) contingent fee cases differently from all others in counting billable hours for compensation purposes.

Yet Rosenthal presented evidence that SNR had treated him very differently from other partners in setting his 2005-2006 contract number. At the same time that the jury could credit him with having generated much of the nearly $ 18 million in fees collected from the Libya case in 2003-2004 (placing him sixth among all equity partners in collections for the period), it heard testimony that his ratio of contract number to collections for 2005-2006 was less than half that of the other top earners of the firm, substantiating his expert's opinion that he had been compensated at a rate substantially below other partners with comparable performances. It further heard evidence that he was not given billable hour credit for the Libya work in the way the firm normally treated contingent fee cases. And, finally, there was evidence that SNR gave Rosenthal no credit for substantial collections - nearly $ 20 million - from antitrust litigation between Sun Microsystems and Microsoft despite what the jury could find

was his shared role in bringing Sun Microsystems to the firm and a general SNR policy to give ongoing compensation credit for such origination.

In sum, although Rosenthal indeed was given a contract number for 2005-2006 more than double his previous one despite evidence (adduced by SNR) that questioned the quality of his work and the number of hours he had reasonably spent on the Libya litigation at the firm, the jury could fairly conclude that he had been dealt with arbitrarily for that period in relation to partners similarly situated, and thus denied "the fruits of the bargain" struck in the Partnership Agreement and related compensation policies of the firm. We have no basis on which to disturb the jury's findings in this regard.[6]

IV.

As pointed out, the trial judge reduced the jury's award of damages to $ 365,639 because in his view Rosenthal could not recover for the period after he had left SNR voluntarily in July 2005. Rosenthal responds (a) that the judge erroneously failed to let the jury decide whether his departure was indeed volun-

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[6] SNR cites to the *Dunlap* court's additional statement that "[o]nly when it is clear from the writing that the contracting parties would have agreed to proscribe the act later complained of . . . had they thought to negotiate with respect to that matter may a party invoke the covenant [of good faith's] protections." *878 A.2d at 442.* It argues that by signing their own Schedule A's (and "re-executing" thereby the Partnership Agreement) for 2005-2006 after Rosenthal had left the firm, the other equity partners of SNR all implicitly approved his contract number for that period, hence "would [not] have agreed to proscribe it." This suggestion that all, or even any, of SNR's many partners beyond the P&P Committee ratified (and were even aware of) Rosenthal's compensation treatment merely by signing their own Schedule A's strikes us as fanciful, and we reject it.

tary or whether, as he maintains, he was forced to retire by SNR; and (b) that even if he had left the firm voluntarily, this does not bar him from receiving the benefit of the bargain the jury found SNR had denied him in setting his 2005-2006 contract number. Because we agree with Rosenthal on the latter point, the voluntariness or not of his departure is something we need not decide.

Basic principles of contract law control this question.[7] The law awards damages sufficient to compensate the injured party for what it would have received had the contract been fully performed, as if the breach had not occurred. *See, e.g., Genencor Int'l, Inc. v. Novo Nordisk A/S, 766 A.2d 8, 11 (Del. 2000)* ("remedy for a breach should seek to give the non breaching party the benefit of its bargain by putting that party in the position it would have been [in] but for the breach"). In order to receive that benefit, the injured party need not continue to perform; it may abjure the contract and sue for damages. *See, e.g.*, STANDARD CIVIL JURY INSTRUCTION FOR THE DISTRICT OF COLUMBIA No. 11-17 (2007) (injured party "ha[s] no further duty to perform under the contract"); *BioLife Solutions, Inc. v. Endocare, Inc., 838 A.2d 268, 278 (Del. Ch. 2003)* ("A party is excused from performance under a contract if the other party is in material breach thereof."). Employment contracts are no different from others

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[7] Under Delaware law, "[v]iolation of the duty of good faith and fair dealing is a breach of contract." True North Composites, LLC v. Trinity Indus., Inc., 191 F. Supp.2d 484, 527 (D. Del. 2002), aff'd in relevant part, 65 Fed. Appx. 266 (Fed. Cir. 2003). On this issue of remedy for the breach of the covenant, it is a moot point - on which the parties express no disagreement - whether Delaware or District of Columbia law applies because the parties do not contend that the relevant law differs between the two jurisdictions.

in this regard. While the employee abjuring the contract upon breach generally must mitigate his damages, he may resign and do so elsewhere. *See, e.g., Ward v. American Mut. Liab. Ins. Co., 15 Mass. App. Ct. 98, 443 N.E.2d 1342, 1343 (Mass. App. 1983)* (in breach of employment contract claims, "[i]t is well established that a material breach by one party excuses the other party from further performance under the contract"); *Kass v. Brown Boveri Corp., 199 N.J. Super. 42, 488 A.2d 242, 247 (N.J. Super. Ct. App. Div. 1985)* (plaintiff who resigns because of material breach of employment agreement is entitled to seek full contract damages, because "[i]t would be unjust to permit [employer] to discharge its liability for its clear breach ... by claiming that plaintiff voluntarily resigned").

Whether or not Rosenthal retired voluntarily, he did not have to remain with SNR while suing for breach of the covenant. Indeed, given the firm's policy of requiring a signing of the Schedule A's as a condition of an equity partner's continued employment, it is hard to imagine that the firm would have allowed him to remain a partner once he sued it. *See* Partnership Agreement Art. 8.6 ("cause" permitting removal of a partner, to be determined "conclusively" by three-fourths vote of equity partners, includes "conduct . . . materially adverse to the best interests of the partnership"). SNR points to this court's observation in *Wisconsin Ave. Nursing Home v. District of Columbia Comm'n on Human Rights, 527 A.2d 282 (D.C. 1987)*, that "[h]ad [the plaintiffs] voluntarily quit their jobs at [defendant company, its] backpay liability would have terminated," because "a voluntary termination of employment represents a choice to incur a loss of earnings in violation of the employee's duty to make reasonable efforts to mitigate damages." *Id. at 292.* But *Wisconsin Ave. Nurs-*

ing Home concerned a claim of employment discrimination, not breach of contract, and in point of fact Rosenthal mitigated his damages by joining Constantine Cannon soon after his retirement. Nothing in law or logic made the retirement a bar to the benefits of the bargain he sought to obtain by a lawsuit once SNR breached the covenant of good faith and fair dealing. Accordingly, he is entitled to the 2005-2006 damages the jury awarded him for breach of the covenant, minus the compensation he received from SNR and Constantine Cannon for the relevant period.

V.

Rosenthal goes beyond disputing the judge's reduction of his damages, however, and makes a twofold argument that the jury's award did not fairly reflect the compensation he should have received for 2005-2006. First, he contends that the jury was asked to find, and found, only the contract number he should have been given for that period, and that the judge erred in not increasing the award (on Rosenthal's post-trial request) to reflect SNR's net profits for each of 2005 and 2006 and his proportionate share of those profits. This was something the judge could have done, Rosenthal says, because the amount by which total net profits for those years exceeded the estimate underlying contract numbers was undisputed for those years, and thus a simple percentage calculation would yield the additional amount each partner was entitled to above his contract number.[8]

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[8] Rosenthal illustrates the calculation in his brief:

> Assume that an SNR equity partner's contract number was $ 1,000,000, based on an estimated net firm income of $ 100,000,000 for

We reject the premise of this argument because it is clear from the record that for each year in question the jury was not instructed to find, and did not find, the contract number (or estimated compensation) Rosenthal should have received, but rather the actual compensation to which he was entitled. The judge told the jury that, if it found liability, "your job is to determine only the amount of compensation Mr. Rosenthal should have received from [SNR] in ... 2005[-]2006," after which the judge - not the jury - would perform the single remaining calculation of subtracting "the amount he actually received from [SNR] and Constantine Cannon in the same period." This charge was in keeping with Rosenthal's counsel's earlier request for the jury to be told to find "not the contract number" but "the amount of compensation he should have received." And on this basis Rosenthal's attorney, in summation, performed calculations for the jury of what Rosenthal "actually [should have] receive[d]," which was not - he said - "the contract number" but "the actual money that [partners] actually receive," including "plus or minus what the net profits are or net losses are." Contrary to Rosenthal's present assertions, neither this context nor the written verdict form, which merely in-

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the following year. Thus, the partner's equity share is one percent. In [that year], SNR's net firm income exceeded its contract compensation estimate by 19.2 percent. Thus, in this example, SNR's 2003 net income would be $ 119,200,000. The partner would receive an additional 19.2 percent over his contract number, or $ 1,192,000. The partner's equity share, however, remains constant at one percent ($ 1,192,000 - $ 119,200,000), because all equity partners receive an additional 19.2 percent over their individual shares, which total 100 percent.

structed the jury to find "what amount ... [he was] entitled to receive ... for each year" including "contract years 2005-2006," permits a reasonable conclusion that the jury found only contract numbers and left an upward (or downward) adjustment for the judge to make based on actual profits.

Alternatively, however, Rosenthal argues that if the jury indeed found the actual compensation he deserved, the trial judge erred in excluding testimony by himself and his expert accountant, Napolitano, about the compensation he should have received for the years in question. He points out that, on the one hand, the judge would not let him state his own opinion of what his contract numbers should have been, taking into account his billable hours and collections, because in the judge's view "that [was] the role of the expert," Napolitano, whom Rosenthal planned to call; but that, on the other hand, the judge barred Napolitano from opining what the compensation should have been, especially after factoring in net profits for a year and Rosenthal's proportionate share thereof. The result, Rosenthal says, is that the jury was deprived of concrete help in arriving at numbers that reflected the magnitude of his undercompensation. We agree, as to both witnesses, that the judge erred in excluding the proffered testimony.

First, contrary to the judge's ruling that only an expert, not Rosenthal, could opine about the amount of his damages, our decisions are permissive in allowing "lay" opinion testimony by a plaintiff "on the value of [his] damages." *Columbus Properties, Inc. v. O'Connell, 644 A.2d 444, 448 (D.C. 1994)* (citing cases). Rosenthal, as a partner of the firm since 1995, assuredly possessed information that could "assist the trier of fact," *FED. R. EVID. 702*, concern-

ing the criteria and practices employed by SNR in setting contract numbers for equity partners. Moreover, the fact that he would offer an opinion on the "ultimate issue" - *i.e.*, the contract numbers he should have received - was not a reason to exclude his testimony. *See, e.g., Carter v. United States, 614 A.2d 913, 919 (D.C. 1992); accord, FED. R. EVID. 704 (a).* His own contemporaneous review, at the time his contract number was set, of what SNR partners call "the array" of each equity partner's contract number, compensation history, historical fee collections and billable hours gave him personal knowledge the jury could properly consider of what his compensation should have been. That the jury might have discounted this testimony because of his obvious interest in the outcome affected its weight, not admissibility.

Similarly, we see no reason why Napolitano should not have been allowed to state an opinion of what Rosenthal's damage numbers were, especially on the ultimate compensation he should have earned after factoring in net profits for each year in question. The judge ruled that Napolitano was an expert "in the field of accounting" but not in "law firm compensation," and thus not qualified to offer an opinion on what Rosenthal's actual compensation should have been. But Napolitano's proffered testimony on this point was, first, what Rosenthal's SNR earnings would have been for the relevant years had his ratio of compensations to collections been set equal to the average ratio of top earners at the firm; and second, the amount by which SNR's admitted formula or methodology for adjusting contract numbers to reflect net income at year's end, see note *8, supra,* would have increased his ultimate earnings. As an accountant, he was qualified to perform these arithmetical calculations without having to opine on mat-

ters beyond his expertise - such as how SNR or any law firm valued (say) collections or billable hours over other performance measures. The fact that the calculations netted a particular number or range of numbers, in Napolitano's view, and thus touched on the "ultimate issue," was - again - not grounds to exclude them, and any inaccuracies in his understanding of the net profits or other figures relevant to the calculation gleaned from SNR's records went to the weight of his testimony, not its admissibility.

Nor can we say that the exclusion of the relevant testimony by Rosenthal and Napolitano was harmless. *See Jenkins v. Strauss, 931 A.2d 1026, 1037 (D.C. 2007)* (noting this court's application, in civil cases, of the harmless error standard of *Kotteakos v. United States, 328 U.S. 750, 764-65, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946)*, viz., whether "[we can] say, with fair assurance . . . that the judgment was not substantially swayed by the error"). On the issue alone of "what the net income of [SNR] was for any particular year" and thus how the jury could determine "an amount in excess of what [a partner's] contract amount should be," the trial judge himself acknowledged post-trial that the evidence was very weak. Thus we cannot say with confidence that Napolitano's testimony on this point would have furnished the jury with no significant evidence to fill the gap the judge himself identified. Equally important, in the absence of any other opinion testimony about the extent reduced to an actual dollar amount - to which Rosenthal had been unreasonably treated in the compensation decision, his own opinion of what fair contract numbers should have been by comparison to partners similarly situated might have yielded a jury verdict closer to what Rosenthal maintains he had earned, especially from the Libya payoff.

We thus conclude that Rosenthal, should he so elect, see part IX, *infra*, is entitled to a new trial on damages for the breach of the covenant of good faith and fair dealing for the 2005-2006 period.[9]

VI.

In addition to his claim for breach of the contractual covenant, Rosenthal alleged that SNR's undercompensation of him for the relevant years was a breach of its fiduciary duty to him under Delaware law. The jury found against him on this claim, but he argues that it did so because of the trial judge's overly-narrow jury instruction (despite his objection) on how Delaware defines a breach of fiduciary duty by partners of a law firm *inter se*. Rosenthal acknowledged below, however, and does not dispute here, that his compensatory damages for that tort could not exceed those the jury awarded him for breach of the contract. He seeks a new trial only because a favorable verdict on breach of duty would afford a basis - not provided by the contract cause of action - for the punitive damages his complaint also demanded. The issue of error in the instruction on breach of fiduciary duty is moot, however, because we hold (as did the trial judge) that the record as a matter of law fails to support a claim for punitive damages.

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[9] Rosenthal argues that the trial judge erred in denying his request for prejudgment interest. The judge rightly concluded, however, that *D.C. Code § 15-109* (2001) barred the request because Rosenthal had not presented any claim for prejudgment interest to the trier of fact. See, e.g., *District of Columbia v. Pierce Assocs., Inc., 527 A.2d 306, 310-11 (D.C. 1987)*. Nonetheless, if Rosenthal elects to pursue the new trial on damages he is entitled to, we see no principle of preclusion that would keep him from presenting a claim for prejudgment interest to the jury for any damages it should award.

The test for punitive damages in this jurisdiction is a rigorous one.[10] They are

> a form of punishment. Their purpose is to punish unlawful conduct and to deter its repetition. Punitive damages are, accordingly, to be awarded only in cases of outrageous or egregious wrongdoing where the defendant has acted with evil motive, actual malice, or in willful disregard for the rights of the plaintiff.
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> *District Cablevision Ltd. P'ship v. Bassin, 828 A.2d 714, 725 (D.C. 2003)* (citations and internal quotation marks omitted). In keeping with this high substantive burden, "the plaintiff must prove egregious conduct and the requisite mental state by clear and convincing evidence." *Id.*

Rosenthal made no such showing here. The jury found liability for breach of the covenant of good faith and fair dealing based on law that required, as we have seen, proof of arbitrary or unreasonable conduct, not more. That standard did not require it to reach agreement on what motivated SNR's undercompensation of Rosenthal. It could have found, for example, that the compensation decision relied heavily on reports of underperformance or unjustified billing by Rosenthal that, as he alleged, the P&P Committee had made little effort to substantiate - a case of negligence or rash judgment, perhaps, but far from evincing evil motive, actual malice, or willful disregard of his rights. Nor do the other bits of evi-

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[10] Rosenthal does not suggest that the test in Delaware is any less demanding nor, more importantly, why District of Columbia law would not govern this particular issue of remedy.

dence Rosenthal points to rise, individually or in the aggregate, to the level of egregious wrongdoing. It simply is not the case, for instance, that when he was directed by SNR in December 2002 to "focus as little as possible on the Libya case, consistent with our clients' interests," this amounted to a deliberate and unethical command to abandon the firm's Libya clients.[11] And the fact that a senior partner, Caryl Potter (instrumental in setting, but by no means the lone decisionmaker as to, compensation for the relevant periods), elsewhere appeared to treat Rosenthal "with disrespect and contempt" (Br. for Rosenthal at 38) does not nearly demonstrate that the compensation decisions of the P&P Committee were actuated by malice or evil motive. SNR presented a variety of evidence for the inference that raising

Rosenthal's contract number from $ 325,000 to $ 800,000 for 2005-2006 was reasonable credit - under the firm's "nonformulaic" approach to compensation - for the fees his Libya work had generated. While the jury found that he had been substantially undercompensated all the same, it had no clear and convincing evidence that ill-will, spite or any other form of malice had dictated the contract number reached by the multi-member P&P Committee.

VII.

Rosenthal also appeals from two rulings by the trial judge regarding his retirement from the firm. First, he argues that SNR breached the mandatory

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[11] Aside from emphasizing the qualifier in this directive ("consistent with our clients' interests"), SNR produced evidence that as late as November 2002 Rosenthal himself had characterized the settlement prospects for the Libya litigation as "problematic" and stated that "since May" the case "had gone sour."

retirement provision of the Partnership Agreement by forcing him to retire at age 65 instead of 70, as (he contends) the Agreement provided. Although he does not say so expressly in his brief, this presumably is a claim that he was entitled to damages in the form of compensation for the years beyond 2005-2006 up to and including 2010, when he would reach age 70.

The difficulty we have with this claim is determining how his damages could ever be calculated for that period (he offers no help to us on the issue) given SNR's system of setting contract numbers by looking back, importantly if not exclusively, to immediate past performance by the partner. Since Rosenthal did not remain with the firm after July 2005, it is virtually impossible to see how a jury that found breach of the retirement clause could determine at what number his compensation should have been set for the years after 2006. On this ground alone - the speculativeness of his claim for damages - we sustain the judge's ruling that, as a matter of law, he had not shown a breach of the retirement provision.[12]

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[12] Our original opinion in this case concluded that summary judgement was also proper on the claimed breach of the retirement clause because undisputed evidence showed that, under a 1999 amendment of the Partnership Agreement, Rosenthal was obligated to retire at age 65. On further reflection in light of SNR's petition for rehearing and the opposition thereto, we now conclude that the evidence is not one sided on whether Rosenthal, had he not become SNR's adversary by suing it, would have had to retire at age 65 or, instead, could have remained with the firm under a then-pending revision of the Agreement eliminating the mandatory retirement age. But that issue is a moot one because, as stated in the text, Rosenthal furnished the trial court with no yardstick by which his damages for the alleged breach of the retirement clause could rea-

Rosenthal's second assigned error regarding retirement is that the judge wrongly denied his request for declaratory relief to the effect that he is entitled to retirement benefits under the Agreement for any post-2006 period when his outside legal earnings are less than his retirement benefits.[13] He relies on § 3.3 of the Agreement ("Outside Remuneration"), which generally provides for an offset of outside earnings against retirement benefits, but not a disqualification from receipt of retirement.

The trial judge correctly ruled, however, that § 7.2 of the Agreement foreclosed this argument because Rosenthal was currently employed by a law firm in competition with SNR. That paragraph states:

> [A]n Equity Partner having retired hereby agrees, as a condition of his right to continue to receive Retirement Benefits under Article 5, not to (except with the consent of not less than two-thirds in interest of the Equity Partners) engage in the practice of law in any state in which the partnership has an office ....
>
> Rosenthal was admittedly practicing law at the time in New York, where SNR has an office. Thus section 7.2 unambiguously barred his receipt of retirement benefits while doing so; it cannot reasonably be read as merely

---

sonably be calculated, and on that ground alone summary judgment was correctly entered against him on the claim.

[13] He conceded that he was not presently entitled to retirement payments because his income from practicing law at Constantine Cannon exceeded his SNR retirement benefits at the time of the suit.

subtracting his earnings from that practice from otherwise payable retirement benefits.[14]

VIII.

In 1997, SNR entered into a contingency fee agreement with Rose Mary Copeland to represent her, personally and in her capacity as administrator of the estates of her two grandchildren, in the Copeland family's wrongful death claims against Libya. The retainer agreement entitled SNR to attorney fees of one-half of 20% of the recovery for the estates of the two grandchildren, or $ 1.6 million. SNR's counterclaim against Rosenthal and Constantine Cannon in the present action alleged that they had tortiously interfered with the retainer agreement by inducing Mrs. Copeland to transfer the representation to Rosenthal and Constantine Cannon (which he had meanwhile joined) and to agree to pay Constantine Cannon the $ 1.6 million contingency fee.[15]

---

[14] Rosenthal's lone assigned error not yet addressed is that the trial judge should have let the jury decide his claims for quantum meruit and unjust enrichment, both predicated on the work he had done on the Libya litigation before joining (rather than while working at) SNR. But he admitted in deposition that the firm refused to enter into a "side agreement" or a separate agreement with him as an "individual partner[]" for his prior Libya work when he joined it; rather (he was told) "[t]here is one firm partnership agreement and it is the same . . . terms for all partners." Thus, the Agreement he executed governed his compensation in its entirety, rendering his reliance on non-contractual equitable doctrines unavailing. See, e.g., *Fischer v. Estate of Flax, 816 A.2d 1, 11 (D.C. 2003)* (quoting *Standley v. Egbert, 267 A.2d 365, 368 (D.C. 1970)*; *J.A. Moore Constr. Co. v. Sussex Assocs. Ltd. P'ship, 688 F. Supp. 982, 988 (D. Del. 1988)*.

[15] The counterclaim contained an additional allegation of tortious interference not relevant here.

The complaint acknowledged, however, that in the meantime the United States District Court for the Southern District of New York (Judge Platt), before whom the litigation and eventual settlement of the Libya claims had been consolidated, had resolved the dispute over who deserved the $ 1.6 million attorney fees by awarding them entirely to SNR. Consequently, the damages SNR sought for the alleged tortious interference were limited to its attorney fees and expenses incurred in the motions practice before Judge Platt litigating its entitlement to the $ 1.6 million. The $ 300,000 in fees which the jury awarded SNR reflected what SNR's witness (Schadler) had testified at trial was the approximately " $ 300,000 [SNR] spent ... in the motions practice regarding the Copeland fee dispute."

On appeal, Constantine Cannon argues, among other things, that SNR's counterclaim essentially reduces itself to one for attorney fees and expenses under the wrongful involvement in litigation exception to the American Rule, *see generally Auxier v. Kraisel, 466 A.2d 416, 420 (D.C. 1983)*, and that SNR's suit does not meet the requirements of that cause of action. In its brief, SNR does not dispute that its right to recover in Superior Court depended on satisfaction of the "wrongful involvement in litigation doctrine, which works as an exception to the American Rule [that each party pays its own fees]" (Br. for SNR at 65-66) (quoting *Taylor v. Tellez, 610 A.2d 252, 255 (D.C. 1992))*. We hold that SNR failed as a matter of law to satisfy a key element of that test, so that the claim should not have been submitted to the jury.

> "To enjoy the benefit of this narrow exception,"

> (1) [t]he plaintiff must have incurred attorney's fees in the prosecution or defense of a prior action;
>
> (2) the litigation ordinarily must have been with a third party and not with the defendant in the present action; and
>
> (3) the plaintiff must have become involved in such litigation because of some tortious act of the defendant.
>
> *Safeway Stores, Inc. v. Chamberlain Protective Servs., Inc., 451 A.2d 66, 69 (D.C. 1982)* (quoting *Biddle v. Chatel, 421 A.2d 3, 7 (D.C. 1980)*).

The first part of this test was concededly met here, and for present purposes we assume that a jury could fairly find that "some tortious act of" Rosenthal and Constantine Cannon caused SNR to expend the $ 300,000 in attorney fees and expenses. But the second element is equally critical: the prior litigation "must have been with a third party *and not with* the defendant in the present action." *Id.* (emphasis added). *See Biddle, 421 A.2d at 8-9* (denying fee recovery under doctrine because prior litigation was against defendant in present action, as well as third party). And that is where SNR's action fails.

Judge Platt in the federal court had jurisdiction over all matters related to the Libya litigation, including possible disputes over how contingent attorney fees resulting from a settlement would be distributed. Also, once Constantine Cannon asserted there an entitlement to all or part of the $ 1.6 million resulting from the Copeland portion of the settle-

ment, it - as well as Rosenthall[16] - was undeniably a party to the motions practice in which SNR successfully disputed the effort to deny it any of the $ 1.6 million. Yet SNR, having prevailed in that litigation, made no effort to obtain attorney fees or related expenses for having been wrongfully forced to litigate over its entitlement to the award. While such fees, of course, would not have been available to it as a matter of course, Judge Platt had ample authority to entertain and grant a request for fees if, as SNR maintains, Constantine Cannon had no colorable basis for asserting entitlement to all or any of the $ 1.6 million. *See, e.g., Chambers v. NASCO, Inc., 501 U.S. 32, 42-53, 111 S. Ct. 2123, 115 L. Ed. 2d 27 (1991)* (affirming award of attorney fees imposed under the bad faith exception to the American Rule and the court's inherent powers); *Roadway Express, Inc. v. Piper, 447 U.S. 752, 767, 100 S. Ct. 2455, 65 L. Ed. 2d 488 (1980)* (attorney personally liable for attorney fees under bad faith exception); *Baker v. Urban Outfitters, Inc., 431 F. Supp.2d 351, 363, 365-66 (S.D.N.Y. 2006)* (federal court could award attorney fees against attorney that sought unwarranted financial windfall under either court's inherent power or *28 U.S.C. § 1927*); *see also In re Austrian & German Bank Holocaust Litig., 317 F.3d 91, 98 (2d Cir. 2003)* ("Whenever. a district court has federal jurisdiction over a case, it retains ancillary jurisdiction after dismissal to adjudicate collateral matters such as attorney's fees"). Indeed, as SNR's counterclaim itself pointed out, Judge Platt in awarding the $ 1.6 million to SNR had declared himself "troubled by what appeared to be an effort [by Constantine Cannon] to leave SNR in the dark about the distribution

---

[16] He, of course, was in privity with Constantine Cannon as a partner at the firm.

of the [Copeland settlement] proceeds" and its related contractual share of them. There is thus no reason to doubt that he would have treated seriously a fee petition alleging bad faith. Nor, for that matter, did SNR's claim in Superior Court that Rosenthal and Constantine Cannon had used Mrs. Copeland as a catspaw to divert the $ 1.6 million to themselves require a lesser showing of bad faith than would have been needed before Judge Platt. *See Goldschmidt v. Paley Rothman Goldstein Rosenberg & Cooper, Chartered, 935 A.2d 362, 381 (D.C. 2007)* (attorney may be liable only if he "possess[es] a desire to harm [another] which is independent of the desire to protect his client. This would constitute *actual malice,* and therefore substantiate a tortious interference with contract claim" (citation omitted; emphasis added).[17]

SNR asserts that "at the time the fee dispute in the New York federal court was being litigated, many of the relevant facts surrounding [Rosenthal's] and Constantine's tortious conduct had not yet been. developed and were not before Judge Platt" (Br. for SNR at 67), the implication being that these came to light only between the issuance of Judge Platt's award of the $ 1.6 million in July 2006 and the filing of the counterclaim in March 2007. But Judge Platt was clearly aware of many of the facts SNR later alleged as proof of deception and dishonesty by Rosenthal and Constantine Cannon, including the apparent effort he described "to leave SNR in the dark

---

[17] Recognizing this, the counterclaim alleged that "Mr. Rosenthal's and Constantine's actions did not serve the best, or any, interests of the Copelands. Instead, those actions, which put the Copelands into direct breach of their retainer agreement and exposed them to suit, were intended to serve the interests of Mr. Rosenthal and Constantine."

about the distribution of the [Copeland family] proceeds following the settlement of [New Jersey] probate proceedings." Nor does SNR identify the relevant facts that it had no means of discovering in time to bring to Judge Platt's attention, with or without an extension of the prescribed time. *See FED. R. CIV. PROC. 54 (d)(2)(B)* (allowing fourteen days from judgment for submission of attorney fees request unless "court order provides otherwise"). SNR further argues that, for purposes of the wrongful involvement in litigation exception, its failure to seek fees against Rosenthal and Constantine Cannon in New York is immaterial because Mrs. Copeland was also a party to the proceedings there (with a putative interest herself in reaping a portion of the $ 1.6 million), but "is a `third party' to the present action" (Br. for SNR at 66). The Superior Court judge agreed with this point and told the jury that SNR could recover as long as the New York motion practice was, "in part against Mrs. Copeland." But that misreads the second element of the *Safeway Stores*test, which does not require that the prior litigation was *either* with a third party *or* not with the defendant in the present action. Rather, it "ordinarily must have been with a third party *and not* with the defendant in the present action." *Safeway Stores, 451 A.2d at 69* (emphasis added); *see also Taylor v. Tellez, 610 A.2d at 255.*

SNR has given us no reason to relax this requirement,[18] one obviously designed to prevent the exception for wrongful involvement in litigation from swallowing the American Rule that each party must pay its own attorney. Judge Platt, having just finished the task of weighing the competing claims of

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[18] We find here no "special circumstance," *Safeway Stores, 451 A.2d at 69*, justifying departure from the general rule.

SNR and Constantine Cannon for the $ 1.6 million fees, and expert through experience in deciding when litigation is groundless and should be sanctioned by, for example, a shift in attorney fees, *see FED. R. CIV. PROC. 11*, was well suited to consider the *bona fides* of Constantine Cannon's action in forcing SNR to incur the cost of litigating its right to the contingent fee. Since SNR passed up the opportunity to make Constantine Cannon bear all or some of the costs of that litigation, it is not entitled to a second chance now.

IX.

To summarize, we have held that neither SNR's counterclaim nor Rosenthal's claim for damages for the contract years 2003-2004 should have reached the jury, but that the jury's award of compensation Rosenthal should have received for 2005-2006 is supported by the evidence, and he is entitled to that award (minus the compensation he received from SNR and Constantine Cannon for that period) without the erroneous reduction by the earnings Rosenthal would have been due after his retirement from SNR. At the same time, we have held that Rosenthal is entitled to a new trial on compensatory damages for the 2005-2006 period because his proof of those damages was unduly restricted by the trial judge. This leaves us with the apparent anomaly of a disposition that would vacate the damage award in favor of a new trial on that issue when Rosenthal might, after all, prefer to accept the jury's award as correctly reduced. We will excuse his failure to declare himself on this choice in his briefs, since he may not and need not have anticipated the particular constellation of rulings we have made on the issues. In any event, it would be a gross mismanagement of the resources of a busy trial court for us to require it to re-

try a case on damages if Rosenthal no longer seeks that remedy. In these circumstances, we may properly employ our authority to order a disposition that is "just in the circumstances," *D.C. Code § 17-306*, namely: As to damages for the years 2005-2006, we will vacate the jury's award and remand for a new trial on damages; but if Rosenthal decides instead to accept the jury's present award (appropriately reduced to account for the compensation he received from SNR and Constantin Cannon for that period), he must notify the trial court in timely fashion of that election, and the court should reinstate the award and make the necessary deductions.

Affirmed in part and reversed in part; case remanded for further proceedings consistent with this opinion.

APPENDIX B

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
Civil Division

Civil Action No. 2005 CA 07607 B

DOUGLAS E. ROSENTHAL,

Plaintiff,

v.

SONNENSCHEIN NATH & ROSENTHAL, LLP,
Defendant/ Counterclaimant,

v.

CONSTANTINE CANNON, P.C., and DOUGLAS E. ROSENTHAL,

Counterclaim Defendants.

Judge Melvin Wright
Trial Calendar No. 16
Trial Date: March 10, 2008

JURY VERDICT FORM

1. Did you find the plaintiff, Douglas E. Rosenthal, has proven by a preponderance of the evidence his claim for breach of implied covenant of good faith and fair dealing against defendant, Sonnenschein, Nath & Rosenthal, LLP, for the contract years 2003 – 2004?

   YES __√__ NO _____

2. Did you find the plaintiff, Douglas E. Rosenthal, has proven by a preponderance of the

evidence his claim for breach of implied covenant of good faith and fair dealing against defendant, Sonnenschein, Nath & Rosenthal, LLP, for the contract years 2005 – 2006?

YES __√__ NO _____

3. Did you find the plaintiff, Douglas E. Rosenthal, has proven by a preponderance of the evidence his claim for breach of fiduciary duty against defendant, Sonnenschein, Nath & Rosenthal, LLP, for the contract years 2003 – 2004?

YES _____ NO __√__

4. Did you find the plaintiff, Douglas E. Rosenthal, has proven by a preponderance of the evidence his claim for breach of fiduciary duty against defendant, Sonnenschein, Nath & Rosenthal, LLP, for the contract years 2005 – 2006?

YES _____ NO __√__

If your answer is yes to any of Questions 1 through 4, please proceed to Question 5. If your answer is no to all Questions 1 through 4, proceed directly to Question 6.

5. In what amount do you find plaintiff, Douglas E. Rosenthal, is entitled to receive:

For contract years 2003 – 2004 $ 500,000 for each year

For contract years 2005 – 2006 $1,365,000 for each year

6. Do you find the defendant/counterclaimant, Sonnenschein, Nath & Rosenthal, LLP, has proven by a preponderance of the evidence its claim for tortious interference with the Copeland fee contract by Rosenthal and Constantine Cannon?

Rosenthal YES __√__ NO _____

Constantine Cannon YES __√__ NO _____

7. Do you find the defendant/counterclaimant, Sonnenschein, Nath & Rosenthal, LLP, has proven by a preponderance of the evidence its claim for tortious interference with the 1995 Partnership Agreement by Constantine Cannon?

YES _____ NO __√__

If you answered yes to either Question 6 or Question 7, proceed to Question 8. If you answered no to both Questions 6 and 7, stop and return your verdict.

8. In what amount do you find the defendant/counterclaimant, Sonnenschein, Nath & Rosenthal, LLP, is entitled to receive?

$ 300,000

28 MAR 08 /s/
D A T E JURY FOREPERSON

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
Civil Division

Civil Action No. 2005 CA 07607 B

DOUGLAS E. ROSENTHAL,

Plaintiff,

v.

SONNENSCHEIN NATH & ROSENTHAL, LLP,
Defendant/ Counterclaimant,

v.

CONSTANTINE CANNON, P.C., and DOUGLAS E. ROSENTHAL,

Counterclaim Defendants.

Judge Melvin Wright

JUDGEMENT

This action came for [X] Jury Trial [ ] Non-Jury Trial [ ] Ex-Parte Proof Hearing before the Honorable MELVIN R WRIGHT, Superior Court Judge, presiding and

[ ] proof having been duly presented

[X] the jury having rendered its verdict

[ ] and the judge having rendered a decision

it is on this date March 28, 2008,

ORDERED

That judgment be entered in favor of ROSENTHAL, DOUGLAS E. and against SONNENSCHEIN, NATH & ROSENTHAL LLP in the amount of $3,730,000.00, with interest, thereon at the statutory rate and his costs of action.

FURTHER ORDERED

That, on the defendant's counterclaim, judgment be entered in favor of SONNENSCHEIN, NATH & ROSENTHAL LLP, and against CONSTANTINE CANNON, P.C. & DOUGLAS E. ROSENTHAL, in the amount of $300,000.00, with interest, thereon at the statutory rate and their costs of action.

Duane B. Delaney
Clerk of the Court

/s/ Kristina Ingram
Kristina Ingram,
Courtroom Clerk

CC:
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NEW YORK, NY 10017

Mr. ANKUR KAPOOR
450 Lexington Avenue
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SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
Civil Division

Civil Action No. 2005 CA 07607 B

DOUGLAS E. ROSENTHAL,

Plaintiff,

v.

SONNENSCHEIN NATH & ROSENTHAL, LLP,

Defendant

Judge Melvin Wright

AMENDED JUDGEMENT

This action came for [X] Jury Trial [ ] Non-Jury Trial [ ] Ex-Parte Proof Hearing before the Honorable MELVIN R WRIGHT, Superior Court Judge, presiding and

[ ] proof having been duly presented

[ ] the jury having rendered its verdict

[X] and the judge having rendered a decision

it is on this date June 17, 2008,

ORDERED

That judgment be entered in favor of ROSENTHAL, DOUGLAS E. and against SONNENSCHEIN, NATH & ROSENTHAL LLP in the amount of $65,639.00, with interest, thereon at the statutory rate and his costs of action.

Duane B. Delaney
Clerk of the Court

/s/ Kristina Ingram
Kristina Ingram,
Courtroom Clerk

SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
Civil Division

Civil Action No. 2005 CA 07607 B

DOUGLAS E. ROSENTHAL,
Plaintiff & Counterclaim Defendant

v.

SONNENSCHEIN NATH & ROSENTHAL, LLP,
Defendant & Counterclaim Plaintiff,

v.

CONSTANTINE CANNON, P.C.,
Counterclaim Defendant.

Judge Melvin R. Wright
Calendar #16

ORDER GRANTING DEFENDANT SONNENSCHEIN NATH & ROSENTHAL LLP'S MOTION TO AMEND THE JUDGMENT

UPON CONSIDERATION of Defendant Sonnenschein Nath & Rosenthal LLP's Motion to Amend the Judgment entered by the Court on March 28, 2008, the Plaintiff's written and oral opposition thereto, and the entire record herein, it is by the Court this 19th day of June 2008, hereby

ORDERED, that the Motion is hereby **GRANTED** for the reasons as fully set forth by the Court at the Motions Hearing conducted on June 17, 2008.

SO ORDERED.

/s/ Melvin R. Wright
HON. MELVIN R. WRIGHT

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SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
Civil Division

Civil Action No. 2005 CA 07607 B

DOUGLAS E. ROSENTHAL,
Plaintiff & Counterclaim Defendant

v.

SONNENSCHEIN NATH & ROSENTHAL, LLP,
Defendant & Counterclaim Plaintiff,

v.

CONSTANTINE CANNON, P.C.,
Counterclaim Defendant.

Judge Melvin R. Wright
Calendar #16

ORDER DENYING DEFENDANT'S MOTION FOR JUDGMENT AS A MATTER OF LAW

UPON CONSIDERATION of Defendant and Counterclaim-Plaintiff Sonnenschein Nath & Rosenthal LLP's ("Sonnenschein") renewed Motion for Judgment as a matter of law on Plaintiff's claim for breach of the implied covenant of good faith and fair dealing, the Plaintiff's written and oral opposition thereto, and the entire record herein, it is by the Court this 19th day of June 2008, hereby

ORDERED, that the Motion is hereby **DENIED** for the reasons as fully set forth by the Court at the Motions Hearing conducted on June 17, 2008.

SO ORDERED.

/s/ Melvin R. Wright
HON. MELVIN R. WRIGHT

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SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
Civil Division

Civil Action No. 2005 CA 07607 B

DOUGLAS E. ROSENTHAL,
Plaintiff & Counterclaim Defendant

v.

SONNENSCHEIN NATH & ROSENTHAL, LLP,
Defendant & Counterclaim Plaintiff,

v.

CONSTANTINE CANNON, P.C.,
Counterclaim Defendant.

Judge Melvin R. Wright
Calendar #16

ORDER DENYING PLAINTIFF'S MOTION TO AMEND THE JUDGMENT

UPON CONSIDERATION of Plaintiff Douglas E. Rosenthal's Motion to Amend the Judgment entered by the Court on March 28, 2008, upon the jury's verdict in Plaintiff's favor on Plaintiff's claim that Defendant Sonnenschein Nath & Rosenthal LLP ("SNR") breached the implied covenant of good faith and fair dealing, the Defendant's written and oral opposition thereto, and the entire record herein, it is by the Court this 19th day of June 2008, hereby

ORDERED, that the Motion is hereby **DENIED** for the reasons as fully set forth by the Court at the Motions Hearing conducted on June 17, 2008.

SO ORDERED.

/s/ Melvin R. Wright
HON. MELVIN R. WRIGHT

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SUPERIOR COURT
OF THE DISTRICT OF COLUMBIA
Civil Division

Civil Action No. 2005 CA 07607 B

DOUGLAS E. ROSENTHAL,
Plaintiff & Counterclaim Defendant

v.

SONNENSCHEIN NATH & ROSENTHAL, LLP,
Defendant & Counterclaim Plaintiff,

v.

CONSTANTINE CANNON, P.C.,
Counterclaim Defendant.

Judge Melvin R. Wright
Calendar #16

ORDER DENYING COUNTERCLAIM DEFENDANTS' RENEWED MOTION FOR JUDGEMENT AS A MATTER OF LAW ON COUNT IV OF DEFENDANT'S COUNTERCLAIM, OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

UPON CONSIDERATION of Counterclaim Defendants Douglas E. Rosenthal and Constantine Cannon LLP's Renewed Motion for Judgment as a Matter of Law on Count IV of Defendant's Counterclaim, or, in the Alternative, for a New Trial, the Counterclaim Plaintiff's written and oral opposition thereto, and the entire record herein, it is by the Court this 19th day of June 2008, hereby

ORDERED, that the Motion is hereby **DENIED** for the reasons as fully set forth by the Court at the Motions Hearing conducted on June 17, 2008.

SO ORDERED.

/s/ Melvin R. Wright
HON. MELVIN R. WRIGHT

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APPENDIX C

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Decided: March 18, 2010

Nos. 08-CV-1003 & 08-CV-1056

DOUGLAS E. ROSENTHAL and CONSTANTINE CANNON, LLP,

Appellants/ Cross-Appellees,

v.

SONNENSCHEIN NATH & ROSENTHAL, LLP,

Appellee/Cross-Appellant.

Appeal from the Superior Court of the District of Columbia

ON PETITION FOR REHEARING OR REHEARING EN BANC

BEFORE: WASHINGTON, Chief Judge, RUIZ, REID, GLICKMAN, KRAMER, FISHER, *BLACKBURNE-RIGSBY, THOMPSON, and *OBERLY, Associate Judges, and *FARRELL, Senior Judge.

ORDER

On consideration of the petition of appellee/cross-appellant for rehearing or rehearing en banc, and the response thereto, it is

ORDERED by the merits division * that the petition for rehearing is granted only to the extent that

the following modifications will be made to this court's opinion issued on December 24, 2009 (and reported at *985 A.2d 443*):

1. On page 20 of the slip opinion, line 12 (*985 A.2d at 456*), the word "first" is deleted from the sentence beginning "The first difficulty we have ...."

2. On the same page, line 18, the word "could" is deleted from the sentence beginning "On this ground alone ...."

3. On page 21 (*985 A.2d at 457*), the full paragraph beginning "But the record also supports . . ." is deleted.

4. In place of footnote 12 on page 21, a new footnote 12 is substituted as follows:

> "Our original opinion in this case concluded that summary judgment was also proper on the claimed breach of the retirement clause because undisputed evidence showed that, under a 1999 amendment of the Partnership Agreement, Rosenthal was obligated to retire at age 65. On further reflection in light of SNR's petition for rehearing and the opposition thereto, we now conclude that the evidence is not one-sided on whether Rosenthal, had he not become SNR's adversary by suing it, would have had to retire at age 65 or, instead, could have remained with the firm under a then- pending revision of the Agreement eliminating the mandatory retirement age. But that issue is a moot one because, as stated in the text, Rosenthal furnished the trial court with *no* yardstick by which his damages for the alleged breach of the retirement clause could reasonably be calculated, and on that ground alone sum-

mary judgment was correctly entered against him on the claim."

It appearing that no judge of this court has called for a vote on the petition for rehearing en banc, it is

FURTHER ORDERED that the petition for rehearing en banc is denied.

PER CURIAM.

APPENDIX D

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Decided: May 20, 2010

Nos. 08-CV-1003 & 08-CV-1056

DOUGLAS E. ROSENTHAL, et al.,
Appellants/Cross-Appellees,
CAB7607-05

v.

SONNENSCHEIN NATH & ROSENTHAL, LLP,
Appellee/Cross-Appellant.

BEFORE: Blackburne-Rigsby and Oberly, Associate Judges; Farrell, Senior Judge

ORDER

On consideration of the motion of appellee/cross-appellant to stay issuance of mandate to file petition for writ of certiorari or petition for second rehearing by the division, the response of appellants/cross-appellees thereto, the reply memorandum of appellee/cross-appellant in support of motion to stay, the second petition of appellee/cross-appellant for rehearing, and the response thereto, it is

ORDERED that the second petition of appellee/cross-appellant for rehearing is denied. It is

FURTHER ORDERED that the motion of appellee/cross-appellant to stay issuance of mandate is denied.

PER CURIAM

Copies to:

Honorable Melvin R. Wright

Clerk, Superior Court

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APPENDIX E

Appendix E sets forth the initial opinion of the District of Columbia Court of Appeals, prior to amendment on petition for rehearing.

The deleted portions of the opinion are highlighted in bold.

IN THE DISTRICT OF COLUMBIA COURT OF APPEALS

Decided: December 24, 2009

Nos. 08-CV-1003 & 08-CV-1056

DOUGLAS E. ROSENTHAL and CONSTANTINE CANNON, LLP,

Appellants/ Cross-Appellees,

v.

SONNENSCHEIN NATH & ROSENTHAL, LLP,

Appellee/Cross-Appellant.

Appeal from the Superior Court of the District of Columbia

Before BLACKBURNE-RIGSBY and OBERLY, Associate Judges, and FARRELL, Senior Judge.

FARRELL, *Senior Judge:*

These consolidated appeals present a welter of issues arising from a dispute over the compensation that a law partner was owed by his firm for work done chiefly on behalf of parties claiming damages from the Libyan government for the destruction of Pan Am Flight 103 over Lockerbie, Scotland in 1988.

Appellant/cross-appellee Douglas E. Rosenthal (hereafter Rosenthal) was awarded more than $3.7 million in compensation by a Superior Court jury for breach of the implied covenant of good faith and fair dealing by his former law firm, Sonnenschein Nath & Rosenthal (hereafter SNR).[1] Rosenthal appeals, arguing mainly (though not only) that the trial judge erroneously reduced the damage award because Rosenthal had retired from SNR during one of the two relevant contract periods of employment. SNR, as cross-appellant, counters that Rosenthal is precluded from challenging his compensation for the first of the relevant contract periods because he agreed to accept the compensation number at the time; and, as to the second period, argues that the evidence failed to support a cause of action for breach of the implied covenant under governing Delaware law. For its part, SNR won damages of $300,000 from the same jury from Rosenthal and his new employer, the law firm Constantine Cannon, LLP, for tortious interference with SNR's retainer agreement with a former client and the firm's entitlement to $1.6 million in attorney fees resulting from the Libya litigation.

We hold that Rosenthal could not properly recover for the first employment period in question (2003-2004), but that the jury's sizable award of damages for the second period (2005-2006) is supported by the evidence. Moreover, the trial judge erred, as to that period, by reducing the damage award to the extent of compensation Rosenthal would have been entitled to from SNR had he not retired from the firm. At the same time, the judge

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[1] The "Rosenthal" in the firm name is not Douglas E. Rosenthal.

erred prejudicially in limiting Rosenthal's proof of the compensation he should have received during the 2005-2006 period, which entitles him to a new trial on compensatory damages. For that reason, we will order the unusual but permissible disposition of permitting Rosenthal to elect on remand between a new trial on damages and acceptance of the jury verdict reduced as required by our decision. *See* D.C. Code § 17-306 (2001) (court of appeals on review may "direct the entry of such appropriate order . . . or require such further proceedings ... as is just in the circumstances"). Finally, we reverse the judgment holding Rosenthal and Constantine Cannon liable for tortious interference, because that suit amounted to a claim for wrongful involvement in litigation and SNR did not meet the requirements as a matter of law for that cause of action.

I.

In 1993, Rosenthal and others filed a law suit against the nation of Libya for its role in the destruction of Pam Am Flight 103 on behalf of families of persons lost in the disaster. In 1994, Rosenthal joined SNR as an equity partner in the firm's Washington, D.C. office and continued to pursue the Libya litigation along with his other work. According to the firm's 1995 Partnership Agreement (hereafter "the Agreement"), which Rosenthal signed, each equity partner receives a percentage of the firm's annual income. The Agreement vests in the Policy and Planning (P&P) Committee the authority to set, and re-adjust every two years, the percentage of net firm income to be earned by each equity partner "in accordance with procedures established from time to time by the P&P Committee." At the relevant times, a partner's compensation for a given two-year period was determined by a

two-step process: first by setting a "contract number," which was the base profit share for each partner at the beginning of the two-year period, then by decreasing or increasing this number at the end of each year to reflect the firm's actual financial performance for that year. At trial, the parties disputed the relative importance, under criteria adopted by the P&P Committee, of factors such as collections, billable hours, and how billing was credited for contingent fee cases (such as the Libya litigation) in setting contract numbers.

The relative weight of these factors was important[2] because, in late 2003, the Libya case settled and over the next year SNR received an aggregate of nearly $18 million in attorney fees from the case. The P&P Committee set Rosenthal's contract number at $800,000 for the 2005-2006 contract period, compared to his $325,000 contract number for the previous period of 2003-2004. Believing this to be an inadequate reflection of his work leading to the Libya fee collection and his other work in the past two years, Rosenthal sought reconsideration of the proposed compensation by the P&P Committee, unsuccessfully.

Rosenthal left SNR at the end of July 2005 and subsequently joined Constantine Cannon, LLP. In September of that year he filed suit against SNR in Superior Court, alleging, *inter alia,* breach of the Agreement's implied covenant of good faith and fair dealing in the determination of his contract numbers for 2003-2004 and 2005-2006. The trial judge in-

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[2] Or at least the jury could so find, although SNR strenuously asserted that its determination of contract numbers was holistic and "non-formulaic."

structed the jury on the definition of this covenant under Delaware law,[3] and the jury returned a verdict for Rosenthal on that count, awarding him damages of $3,730,000. Specifically, it found that he was entitled to receive $500,000 for each year for the 20032004 period, and $1,365,000 for each year of 2005 and 2006. On the other hand, the jury found for SNR on its counterclaim alleging tortious interference by Rosenthal and Constantine Cannon, and awarded SNR $300,000 on that claim.

After both parties filed motions to amend the judgment, the trial judge reducedRosenthal's damage award to $365,639, reflecting (1) compensation actually received by Rosenthal from SNR and Constantine Cannon during the relevant periods, and (2) the judge's conclusion that Rosenthal was not entitled to damages for the period after what the judge had ruled to be his voluntary retirement from SNR.[4] The judge also deducted the $300,000 in damages awarded to SNR, resulting in a final judgment of $65,639 for Rosenthal and against SNR.

II.

SNR, in its cross-appeal, challenges Rosenthal's entitlement to any damages for the 2003-2004 contract period because, after the P&P Committee set his contract number for that period, he signed

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[3] A 2003 amendment to the Agreement provides that "[t]his Partnership Agreement and the partnership shall be governed by the laws of the State of Delaware."

[4] The judge had earlier granted summary judgment to SNR on Rosenthal's claim for breach of the Agreement's mandatory retirement clause, concluding as a matter of undisputed fact that he had retired voluntarily from the firm.

a "Schedule A" form stating that number and thereby agreed to the base compensation amount for the succeeding two years. The trial judge denied summary judgment on this point, believing that Rosenthal's signature on the form only acknowledged the contract number the firm was proposing and did not constitute acceptance of it. We think SNR's position is the only one fairly supported by the record.

SNR's practice, following determination of an equity partner's contract number for the next two years, was to circulate a Schedule A form for the partner to sign pursuant to Section 3.7 of the Partnership Agreement. That section provided:

> [E]ach Equity Partner shall receive ... the percentage of Net Income to Equity Partners ... stated in Schedule A ... as changed from time to time in accordance with this agreement, each initialed for identification by the Equity Partner whose percentage of Net Income ... is therein stated ....

The Schedule A form itself listed the partner's percentage of firm income and stated:

> By executing this Schedule A, I also confirm that I have received a copy of the SNR Amended and Restated Partnership Agreement made as of January 1, 1995, and I hereby re-execute said Agreement as modified by subsequent additions and withdrawals of Equity Partners and adjustment of Schedule A in accordance with the terms of said Agreement.

The undisputed testimony at trial was that, to remain an equity partner at the firm, each equity

partner had to sign Schedule A for the next two-year period. Accordingly, Rosenthal signed the Schedule A in 2002 for the succeeding two years. (He did not sign one in 2004, however, because the firm was considering a new partnership agreement and thus the schedules were not circulated until after he left the firm in 2005).

Rosenthal argues that SNR, as a law firm, certainly knew how to draft an express waiver of any challenge to the contract number if that had been the intent behind the Schedule A. While that is true - there is a certain periphrastic quality to the language in the Agreement and the Schedule A itself setting forth its meaning and effect - the consequence of Rosenthal's signing the schedule allows for no reasonable doubt. By signing the Schedule A, he "re-executed" the Partnership Agreement "as modified" to reflect the "adjustment[] of Schedule A" stating his contract number for the next two years. That number thus effectively became a term of the Agreement he accepted by signing the incorporated schedule.

In his deposition testimony, read into the record at trial, Roshenthal recognized that by signing the Schedule A he was "committing myself to the... compensation arrangement... for me as set forth in this Schedule A... and this is my agreement to accept that compensation level in each of these two-year periods." Elsewhere he testified that by signing Schedule A he "reaffirm[ed]" his "understand[ing]" of what he would be paid for the next two years, even if he did not consider this to be "fair and reasonable." Where, as here, an equity partner's continued employment by the firm was conditioned on his signing the schedule, it makes no sense to argue, as Rosenthal does, that SNR merely wanted an "ac-

knowledgment" of its proposed contract numbers without any greater legal effect. Instead, the evident purpose of the Schedule A was to resolve any outstanding compensation disputes rather than to permit later controversy, and possibly lawsuits, challenging the contract numbers. Rosenthal is thus foreclosed from disputing the contract number for 20032004 that he accepted.

III.

SNR is on considerably weaker footing in arguing that judgment as a matter of law should have been entered in its favor for the 2005-2006 contract number. That argument presents a straightforward question of sufficiency of the evidence, and the law is settled that unless no reasonable juror could have found in favor of the verdict the jury reached, it must be sustained. *See, e.g., Dyer v. William S. Bergman & Assocs.*, 657 A.2d 1132, 1136 (D.C. 1995). The trial judge instructed the jury on breach of the implied covenant of good faith and fair dealing under Delaware law, quoting for the jury the Delaware Supreme Court's most recent exposition of the covenant in *Dunlap v. State Farm Fire & Cas. Co.*, 878 A.2d 434 (Del. 2005). There, the court explained that resort to the implied covenant - which "attaches to every contract" - is a "quasi-reformation" of the contractual agreement itself and thus "should be a rare and fact-intensive exercise, governed solely by issues of compelling fairness." Id. at 442 (internal quotation marks and citations omitted). But, while stressing caution in application of the covenant, the court did not define it in the crabbed manner SNR advocates in its brief when it argues (for example) that the conduct at issue must have "involved fraud, deceit, or misrepresentation" to be a breach of the covenant.

See Br. for SNR at 31 (citations omitted).[5] Rather, *Dunlap* explains - and the trial judge here instructed - that the implied covenant requires a contracting party "to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party ... from receiving the fruits of the bargain"; it subjects to liability parties whose conduct "frustrates the overarching purpose of the contract by taking advantage of their position to control implementation of the agreement's terms"; and Delaware law recognizes "the occasional necessity of implying contract terms to ensure [that] the parties' reasonable expectations are fulfilled." *Dunlap*, 878 A.2d at 442 (citations and internal quotation marks omitted).

Viewed in the light most favorable to Rosenthal, the evidence he presented allowed the jury to find that SNR's conduct in setting his contract number for the 2005-2006 period was an unevenhanded, and thus unreasonable, application of the firm's criteria for setting compensation by decisionmakers (the P&P Committee) who were in a "position to control implementation of the [Partnership

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[5] A single judge decision of the Court of Chancery of Delaware, *Continental Ins, Co. v. Rutledge & Co.*, 750 A.2d 1219 (Del. Ch. 2000), so held ("The Delaware Supreme Court has explicitly held that claimant must demonstrate that the conduct at issue involved fraud, deceit or misrepresentation in order to prove a breach of the implied covenant."). But the *Dunlap* decision, discussed in the text, implicitly rejects so narrow an understanding of the doctrine in Delaware. The decision in *Merrill v. Crothall-American, Inc.*, 606 A.2d 96 (Del. 1992), on which the Chancery Court judge had relied, involved a claim of deceptive inducement of another to enter into an employment contract a form of breach of the implied covenant that by definition would implicate deceit or fraud.

A]greement's terms." The Agreement itself listed no criteria by which contract numbers were to be fixed; it left the process for doing so to the P&P Committee. As mentioned, the parties presented conflicting evidence about the importance that individual considerations - such as collections and billable hours during the previous years - were intended to play in the determination. SNR highlighted the P&P Committee's written statement of compensation policy which expressly made the contract number decision "non-formulaic," one that took into account a "wide range of quantitative and qualitative factors." But Rosenthal countered with evidence that the written policy stressed collections and billable hours by stating that "'billing credit,' realization and billable hours are the three [factors] featured and emphasized... in the reports specially prepared for [P&P] for use in the contract process." Moreover, Rosenthal's expert witness accountant, Michael Napolitano, had reviewed SNR equity partner compensation data and found a positive correlation between collections and future compensation - indeed, he said, "the higher the collection amount, the higher the correlation of compensation to collections" was for the years he reviewed. Evidence further allowed the jury to find that SNR generally did not treat (infrequent) contingent fee cases differently from all others in counting billable hours for compensation purposes.

Yet Rosenthal presented evidence that SNR had treated him very differently from other partners insetting his 2005-2006 contract number. At the same time that the jury could credit him with having generated much of the nearly $18 million in fees collected from the Libya case in 2003-2004 (placing him sixth among all equity partners in collections for the

period), it heard testimony that his ratio of contract number to collections for 2005-2006 was less than half that of the other top earners of the firm, substantiating his expert's opinion that he had been compensated at a rate substantially below other partners with comparable performances. It further heard evidence that he was not given billable hour credit for the Libya work in the way the firm normally treated contingent fee cases. And, finally, there was evidence that SNR gave Rosenthal no credit for substantial collections - nearly $20 million - from antitrust litigation between Sun Microsystems and Microsoft despite what the jury could find was his shared role in bringing Sun Microsystems to the firm and a general SNR policy to give ongoing compensation credit for such origination.

In sum, although Rosenthal indeed was given a contract number for 2005-2006 more than double his previous one despite evidence (adduced by SNR) that questioned the quality of his work and the number of hours he had reasonably spent on the Libya litigation at the firm, the jury could fairly conclude that he had been dealt with arbitrarily for that period in relation to partners similarly situated, and thus denied "the fruits of the bargain" struck in the Partnership Agreement and related compensation policies of the firm. We have no basis on which to disturb the jury's findings in this regard.[6]

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[6] SNR cites to the *Dunlap* court's additional statement that "[o]nly when it is clear from the writing that the contracting parties would have agreed to proscribe the act later complained of ... had they thought to negotiate with respect to that matter may a party invoke the covenant [of good faith's] protections." 878 A.2d at 442. It argues that by signing their own Schedule A's (and "re-

IV.

As pointed out, the trial judge reduced the jury's award of damages to $365,639 because in his view Rosenthal could not recover for the period after he had left SNR voluntarily in July 2005. Rosenthal responds (a) that the judge erroneously failed to let the jury decide whether his departure was indeed voluntary or whether, as he maintains, he was forced to retire by SNR; and (b) that even if he had left the firm voluntarily, this does not bar him from receiving the benefit of the bargain the jury found SNR had denied him in setting his 2005-2006 contract number. Because we agree with Rosenthal on the latter point, the voluntariness or not of his departure is something we need not decide.

Basic principles of contract law control this question.[7] The law awards damages sufficient to compensate the injured party for what it would have received had the contract been fully performed, as if

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executing" thereby the Partnership Agreement) for 2005-2006 after Rosenthal had left the firm, the other equity partners of SNR all implicitly approved his contract number for that period, hence "would [not] have agreed to proscribe it." This suggestion that all, or even any, of SNR's many partners beyond the P&P Committee ratified (and were even aware of) Rosenthal's compensation treatment merely by signing their own Schedule A's strikes us as fanciful, and we reject it.

[7] Under Delaware law, "[v]iolation of the duty of good faith and fair dealing is a breach of contract." *True North Composites, LLC v. Trinity Indus., Inc.*, 191 F. Supp.2d 484, 527 (D. Del. 2002), *aff'd in relevantpart*, 65 Fed. Appx. 266 (Fed. Cir. 2003). On this issue of remedy for the breach of the covenant, it is a moot point - on which the parties express no disagreement whether Delaware or District of Columbia law applies because the parties do not contend that the relevant law differs between the two jurisdictions.

the breach had not occurred. *See, e.g., Genencor Int'l, Inc. v. Novo NordiskA/S*, 766 A.2d 8, 11 (Del. 2000) ("remedy for a breach should seek to give the non breaching party the benefit of its bargain by putting that party in the position it would have been [in] but for the breach"). In order to receive that benefit, the injured party need not continue to perform; it may abjure the contract and sue for damages. *See, e.g.*, STANDARD CIVIL JURY INSTRUCTION FOR THE DISTRICT OF COLUMBIA No. 11-17 (2007) (injured party "ha[s] no further duty to perform under the contract"); *BioLife Solutions, Inc. v. Endocare, Inc.*, 838 A.2d 268, 278 (Del. Ch. 2003) ("A party is excused from performance under a contract if the other party is in material breach thereof."). Employment contracts are no different from others in this regard. While the employee abjuring the contract upon breach generally must mitigate his damages, he may resign and do so elsewhere. *See, e.g., Ward v. American Mut. Liab. Ins. Co.*, 443 N.E.2d 1342, 1343 (Mass. App. 1983) (in breach of employment contract claims, "[i]t is well established that a material breach by one party excuses the other party from further performance under the contract"); *Kass v. Brown Boveri Corp.*, 488 A.2d 242, 247 (N.J. Super. Ct. App. Div. 1985) (plaintiff who resigns because of material breach of employment agreement is entitled to seek full contract damages, because "[i]t would be unjust to permit [employer] to discharge its liability for its clear breach... by claiming that plaintiff voluntarily resigned").

Whether or not Rosenthal retired voluntarily, he did not have to remain with SNR while suing for breach of the covenant. Indeed, given the firm's policy of requiring a signing of the Schedule A's as a condition of an equity partner's continued em-

ployment, it is hard to imagine that the firm would have allowed him to remain a partner once he sued it. *See* Partnership Agreement Art. 8.6 ("cause" permitting removal of a partner, to be determined "conclusively" by three-fourths vote of equity partners, includes "conduct ... materially adverse to the best interests of the partnership"). SNR points to this court's observation in *Wisconsin Ave. Nursing Home v. District of Columbia Comm 'n on Human Rights*, 527 A.2d 282 (D.C. 1987), that "[h]ad [the plaintiffs] voluntarily quit their jobs at [defendant company, its] backpay liability would have terminated," because "a voluntary termination of employment represents a choice to incur a loss of earnings in violation of the employee's duty to make reasonable efforts to mitigate damages." *Id.* at 292. But *Wisconsin Ave. Nursing Home* concerned a claim of employment discrimination, not breach of contract, and in point of fact Rosenthal mitigated his damages by joining Constantine Cannon soon after his retirement. Nothing in law or logic made the retirement a bar to the benefits of the bargain he sought to obtain by a lawsuit once SNR breached the covenant of good faith and fair dealing. Accordingly, he is entitled to the 2005-2006 damages the jury awarded him for breach of the covenant, minus the compensation he received from SNR and Constantine Cannon for the relevant period.

V.

Rosenthal goes beyond disputing the judge's reduction of his damages, however, and makes a twofold argument that the jury's award did not fairly reflect the compensation he should have received for 2005-2006. First, he contends that the jury was asked to find, and found, only the contract number

he should have been given for that period, and that the judge erred in not increasing the award (on Rosenthal's post-trial request) to reflect SNR's net profits for each of 2005 and 2006 and his proportionate share of those profits. This was something the judge could have done, Rosenthal says, because the amount by which total net profits for those years exceeded the estimate underlying contract numbers was undisputed for those years, and thus a simple percentage calculation would yield the additional amount each partner was entitled to above his contract number.[8]

We reject the premise of this argument because it is clear from the record that for each year in question the jury was not instructed to find, and did not find, the contract number (or estimated compensation) Rosenthal should have received, but rather the actual compensation to which he was entitled. The judge told the jury that, if it

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[8] Rosenthal illustrates the calculation in his brief:

> Assume that an SNR equity partner's contract number was $1,000,000, based on an estimated net firm income of $100,000,000 for the following year. Thus, the partner's equity share is one percent. In [that year], SNR's net firm income exceeded its contract compensation estimate by 19.2 percent. Thus, in this example, SNR's 2003 net income would be $119,200,000. The partner would receive an additional 19.2 percent over his contract number, or $1,192,000. The partner's equity share, however, remains constant at one percent ($1,192,000-- $119,200,000), because all equity partners receive an additional 19.2 percent over their individual shares, which total 100 percent.

found liability, "your job is to determine only the amount of compensation Mr. Rosenthal should have received from [SNR] in ... 2005[-]2006," after which the judge not the jury - would perform the single remaining calculation of subtracting "the amount he actually received from [SNR] and Constantine Cannon in the same period." This charge was in keeping with Rosenthal's counsel's earlier request for the jury to be told to find "not the contract number" but "the amount of compensation he should have received." And on this basis Rosenthal's attorney, in summation, performed calculations for the jury of what Rosenthal "actually [should have] receive[d]," which was not - he said "the contract number" but "the actual money that [partners] actually receive," including "plus or minus what the net profits are or net losses are." Contrary to Rosenthal's present assertions, neither this context nor the written verdict form, which merely instructed the jury to find "what amount ... [he was] entitled to receive ... for each year" including "contract years 2005-2006," permits a reasonable conclusion that the jury found only contract numbers and left an upward (or downward) adjustment for the judge to make based on actual profits.

Alternatively, however, Rosenthal argues that if the jury indeed found the actualcompensation he deserved, the trial judge erred in excluding testimony by himself and his expert accountant, Napolitano, about the compensation he should have received for the years in question. He points out that, on the one hand, the judge would not let him state his own opinion of what his contract numbers should have been, taking into account his billable hours and collections, because in the judge's view "that [was] the role of the expert,"

Napolitano, whom Rosenthal planned to call; but that, on the other hand, the judge barred Napolitano from opining what the compensation should have been, especially after factoring in net profits for a year and Rosenthal's proportionate share thereof. The result, Rosenthal says, is that the jury was deprived of concrete help in arriving at numbers that reflected the magnitude of his undercompensation. We agree, as to both witnesses, that the judge erred in excluding the proffered testimony.

First, contrary to the judge's ruling that only an expert, not Rosenthal, could opine about the amount of his damages, our decisions are permissive in allowing "lay" opinion testimony by a plaintiff "on the value of [his] damages." *Columbus Properties, Inc. v. O'Connell,* 644 A.2d 444, 448 (D.C. 1994) (citing cases). Rosenthal, as a partner of the firm since 1995, assuredly possessed information that could "assist the trier of fact," FED. R. EVID. 702, concerning the criteria and practices employed by SNR in setting contract numbers for equity partners. Moreover, the fact that he would offer an opinion on the "ultimate issue" - i.e., the contract numbers he should have received - was not a reason to exclude his testimony. *See, e.g., Carter v. United States,* 614 A.2d 913, 919 (D.C. 1992); *accord,* FED. R. EVID. 704 (a). His own contemporaneous review, at the time his contract number was set, of what SNR partners call "the array" of each equity partner's contract number, compensation history, historical fee collections and billable hours gave him personal knowledge the jury could properly consider of what his compensation should have been. That the jury might have discounted this testimony

because of his obvious interest in the outcome affected its weight, not admissibility.

Similarly, we see no reason why Napolitano should not have been allowed to state an opinion of what Rosenthal's damage numbers were, especially on the ultimate compensation he should have earned after factoring in net profits for each year in question. The judge ruled that Napolitano was an expert "in the field of accounting" but not in "law firm compensation," and thus not qualified to offer an opinion on what Rosenthal's actual compensation should have been. But Napolitano's proffered testimony on this point was, first, what Rosenthal's SNR earnings would have been for the relevant years had his ratio of compensations to collections been set equal to the average ratio of top earners at the firm; and second, the amount by which SNR's admitted formula or methodology for adjusting contract numbers to reflect net income at year's end, see note *8, supra,* would have increased his ultimate earnings. As an accountant, he was qualified to perform these arithmetical calculations without having to opine on matters beyond his expertise - such as how SNR or any law firm valued (say) collections or billable hours over other performance measures. The fact that the calculations netted a particular number or range of numbers, in Napolitano's view, and thus touched on the "ultimate issue," was again - not grounds to exclude them, and any inaccuracies in his understanding of the net profits or other figures relevant to the calculation gleaned from SNR's records went to the weight of his testimony, not its admissibility.

Nor can we say that the exclusion of the relevant testimony by Rosenthal and Napolitano

was harmless. *See Jenkins v. Strauss*, 931 A.2d 1026, 1037 (D.C. 2007) (noting this court's application, in civil cases, of the harmless error standard of *Kotteakos v. United States*, 328 U.S. 750, 764-65 (1946), viz., whether "[we can] say, with fair assurance ... that the judgment was not substantially swayed by the error"). On the issue alone of "what the net income of [SNR] was for any particular year" and thus how the jury could determine "an amount in excess of what [a partner's] contract amount should be," the trial judge himself acknowledged post-trial that the evidence was very weak. Thus we cannot say with confidence that Napolitano's testimony on this point would have furnished the jury with no significant evidence to fill the gap the judge himself identified. Equally important, in the absence of any other opinion testimony about the extent reduced to an actual dollar amount - to which Rosenthal had been unreasonably treated in the compensation decision, his own opinion of what fair contract numbers should have been by comparison to partners similarly situated might have yielded a jury verdict closer to what Rosenthal maintains he had earned, especially from the Libya payoff.

We thus conclude that Rosenthal, should he so elect, see part IX, *infra*, is entitled to a new trial on damages for the breach of the covenant of good faith and fair dealing for the 2005-2006 period.[9]

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[9] Rosenthal argues that the trial judge erred in denying his request for prejudgment interest. The judge rightly concluded, however, that D.C. Code § 15-109 (2001) barred the request because Rosenthal had not presented any claim for prejudgment interest to the trier of fact. *See, e.g., District of Columbia v. Pierce Assocs., Inc.*, 527 A.2d 306, 310-11 (D.C. 1987). Nonetheless, if Rosenthal elects

VI.

In addition to his claim for breach of the contractual covenant, Rosenthal alleged that SNR's undercompensation of him for the relevant years was a breach of its fiduciary duty to him under Delaware law. The jury found against him on this claim, but he argues that it did so because of the trial judge's overly-narrow jury instruction (despite his objection) on how Delaware defines a breach of fiduciary duty by partners of a law firm *inter se*. Rosenthal acknowledged below, however, and does not dispute here, that his compensatory damages for that tort could not exceed those the jury awarded him for breach of the contract. He seeks a new trial only because a favorable verdict on breach of duty would afford a basis - n o t provided by the contract cause of action - for the punitive damages his complaint also demanded. The issue of error in the instruction on breach of fiduciary duty is moot, however, because we hold (as did the trial judge) that the record as a matter of law fails to support a claim for punitive damages.

The test for punitive damages in this jurisdiction is a rigorous one.[10] They are

> a form of punishment. Their purpose is to punish unlawful conduct and to deter its repetition. Punitive dam-

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to pursue the new trial on damages he is entitled to, we see no principle of preclusion that would keep him from presenting a claim for prejudgment interest to the jury for any damages it should award.

[10] Rosenthal does not suggest that the test in Delaware is any less demanding nor, more importantly, why District of Columbia law would not govern this particular issue of remedy.

> ages are, accordingly, to be awarded only in cases of outrageous or egregious wrongdoing where the defendant has acted with evil motive, actual malice, or in willful disregard for the rights of the plaintiff.

District Cablevision Ltd. P'ship v. Bassin, 828 A.2d 714, 725 (D.C. 2003) (citations and internal quotation marks omitted). In keeping with this high substantive burden, "the plaintiff must prove egregious conduct and the requisite mental state by clear and convincing evidence." *Id.*

Rosenthal made no such showing here. The jury found liability for breach of the covenant of good faith and fair dealing based on law that required, as we have seen, proof of arbitrary or unreasonable conduct, not more. That standard did not require it to reach agreement on what motivated SNR's undercompensation of Rosenthal. It could have found, for example, that the compensation decision relied heavily on reports of underperformance or unjustified billing by Rosenthal that, as he alleged, the P&P Committee had made little effort to substantiate - a case of negligence or rash judgment, perhaps, but far from evincing evil motive, actual malice, or willful disregard of his rights. Nor do the other bits of evidence Rosenthal points to rise, individually or in the aggregate, to the level of egregious wrongdoing. It simply is not the case, for instance, that when he was directed by SNR in December 2002 to "[f]ocus as little as possible on the Libya case, consistent with our clients' interests," this amounted to a deliberate and unethical command to abandon the firm's Libya cli-

ents.[11] And the fact that a senior partner, Caryl Potter (instrumental in setting, but by no means the lone decisionmaker as to, compensation for the relevant periods), elsewhere appeared to treat Rosenthal "with disrespect and contempt" (Br. for Rosenthal at 38) does not nearly demonstrate that the compensation decisions of the P&P Committee were actuated by malice or evil motive. SNR presented a variety of evidence for the inference that raising Rosenthal's contract number from $325,000 to $800,000 for 2005-2006 was reasonable credit - under the firm's "non formulaic" approach to compensation - for the fees his Libya work had generated. While the jury found that he had been substantially undercompensated all the same, it had no clear and convincing evidence that ill-will, spite or any other form of malice had dictated the contract number reached by the multi-member P&P Committee.

VII.

Rosenthal also appeals from two rulings by the trial judge regarding his retirement from the firm. First, he argues that SNR breached the mandatory retirement provision of the Partnership Agreement by forcing him to retire at age 65 instead of 70, as (he contends) the Agreement provided. Although he does not say so expressly in his brief, this presumably is a claim that he was entitled to damages in the form of compensation for the years be-

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[11] Aside from emphasizing the qualifier in this directive ("consistent with our clients' interests"), SNR produced evidence that as late as November 2002 Rosenthal himself had characterized the settlement prospects for the Libya litigation as "problematic" and stated that "since May" the case "had gone sour."

yond 2005-2006 up to and including 2010, when he would reach age 70.

The first difficulty we have with this claim is determining how his damages could ever be calculated for that period (he offers no help to us on the issue) given SNR's system of setting contract numbers by looking back, importantly if not exclusively, to immediate past performance by the partner. Since Rosenthal did not remain with the firm after July 2005, it is virtually impossible to see how a jury that found breach of the retirement clause could determine at what number his compensation should have been set for the years after 2006. On this ground alone - the speculativeness of his claim for damages - we **could** sustain the judge's ruling that, as a matter of law, he had not shown a breach of the retirement provision.[12]

But the record also supports summary judgment to SNR on this issue because it demonstrates, and Rosenthal does not dispute, that in 1999 the equity partners voted, by the required three-fourths margin under the Agreement, to change the retirement age to 65. Rosenthal almost certainly knew of that change because in late 2004, when he was purportedly told he would have to retire by the end of 2005, he did not question the decision but instead asked for a one-year extension of the date. And no evidence was proffered that the partners had rescinded the change of age by the time Rosenthal left the firm.

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[12] As mentioned earlier, the judge concluded that Rosenthal had not been forced to retire but had voluntarily chosen to do so. As before, we find it unnecessary to review that conclusion.

His claim for breach thus resolves itself to the argument that, despite the partnership vote, SNR never formally amended the Agreement to reflect the age decision and therefore the change - or so a jury could find - somehow lapsed or never became legally effective. But he directs us to nothing in the Agreement that conditioned an amendment of this nature, reached in accordance with the sole provision expressly governing "Amendment,"[13] on formal incorporation of the change into the Agreement. Indeed, where the drafters of the Agreement otherwise meant to require formal "written agreement" of the partners for a change, *see* § 9.1 of the Agreement, they knew how to do so expressly. SNR's conceded oversight in neglecting to conform the written agreement to the partners' decision does not persuade us that triable issues remain on this point, on which summary judgment was thus properly granted.

Rosenthal's second assigned error regarding retirement is that the judge wrongly denied his request for declaratory relief to the effect that he is entitled to retirement benefits under the Agreement for any post-2006 period when his outside legal earnings are less than his retirement benefits.[14] He

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[13] That provision, section 8.4 ("Amendment"), states only that "[t]his agreement may be amended at any time by the action of not less than seventy-five percent in interest of the Equity Partners, provided that each amendment will similarly affect all Equity Partners."

[14] He conceded that he was not presently entitled to retirement payments because his income from practicing law at Constantine Cannon exceeded his SNR retirement benefits at the time of the suit.

relies on § 3.3 of the Agreement ("Outside Remuneration"), which generally provides for an offset of outside earnings against retirement benefits, but not a disqualification from receipt of retirement.

The trial judge correctly ruled, however, that § 7.2 of the Agreement foreclosed this argument because Rosenthal was currently employed by a law firm in competition with SNR. That paragraph states:

> [A]n Equity Partner having retired hereby agrees, as a condition of his right to continue to receive Retirement Benefits under Article 5, not to (except with the consent of not less than twothirds in interest of the Equity Partners) engage in the practice of law in any state in which the partnership has an office ...

Rosenthal was admittedly practicing law at the time in New York, where SNR has an office. Thus section 7.2 unambiguously barred his receipt of retirement benefits while doing so; it cannot reasonably be read as merely subtracting his earnings from that practice from otherwise payable retirement benefits.[15]

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[15] Rosenthal's lone assigned error not yet addressed is that the trial judge should have let the jury decide his claims for quantum meruit and unjust enrichment, both predicated on the work he had done on the Libya litigation before joining (rather than while working at) SNR. But he admitted in deposition that the firm refused to enter into a "side agreement" or a separate agreement with him as an "individual partner[]" for his prior Libya work when he joined it; rather (he was told) "[t]here is one firm partnership agreement and it is the same ... terms for all

VIII.

In 1997, SNR entered into a contingency fee agreement with Rose Mary Copeland to represent her, personally and in her capacity as administrator of the estates of her two grandchildren, in the Copeland family's wrongful death claims against Libya. The retainer agreement entitled SNR to attorney fees of one-half of 20% of the recovery for the estates of the two grandchildren, or $1.6 million. SNR's counterclaim against Rosenthal and Constantine Cannon in the present action alleged that they had tortiously interfered with the retainer agreement by inducing Mrs. Copeland to transfer the representation to Rosenthal and Constantine Cannon (which he had meanwhile joined) and to agree to pay Constantine Cannon the $1.6 million contingency fee.[16]

The complaint acknowledged, however, that in the meantime the United States District Court for the Southern District of New York (Judge Platt), before whom the litigation and eventual settlement of the Libya claims had been consolidated, had resolved the dispute over who deserved the $1.6 million attorney fees by awarding them entirely to SNR. Consequently, the damages SNR sought for the alleged tortious interference were limited to its attorney fees and expenses incurred in the

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partners." Thus, the Agreement he executed governed his compensation in its entirety, rendering his reliance on non-contractual equitable doctrines unavailing. *See, e.g., Fischer v. Estate of Flax*, 816 A.2d 1, 11 (D.C. 2003) (quoting *Standley v. Egbert, 267* A.2d 365, 368 (D.C. 1970); *J.A. Moore Const. Co. v. Sussex Assocs. Ltd. P'ship*, 688 F. Supp. 982, 988 (D. Del. 1988).

[16] The counterclaim contained an additional allegation of tortious interference not relevant here.

motions practice before Judge Platt litigating its entitlement to the $1.6 million. The $300,000 in fees which the jury awarded SNR reflected what SNR's witness (Schadler) had testified at trial was the approximately "$300,000 [SNR] spent... in the motions practice regarding the Copeland fee dispute."

On appeal, Constantine Cannon argues, among other things, that SNR's counterclaim essentially reduces itself to one for attorney fees and expenses under the wrongful involvement in litigation exception to the American Rule, *see generally Auxier v. Kraisel,* 466 A.2d 416, 420 (D.C. 1983), and that SNR's suit does not meet the requirements of that cause of action. In its brief, SNR does not dispute that its right to recover in Superior Court depended on satisfaction of the "wrongful involvement in litigation doctrine, which works as an exception to the American Rule [that each party pays its own fees]" (Br. for SNR at 6566) (quoting *Taylor v. Tellez,* 610 A.2d 252, 255 (D.C. 1992)). We hold that SNR failed as a matter of law to satisfy a key element of that test, so that the claim should not have been submitted to the jury.

"To enjoy the benefit of this narrow exception,"

> (1) [t]he plaintiff must have incurred attorney's fees in the prosecution or defense of a prior action;
>
> (2) the litigation ordinarily must have been with a third party and not with the defendant in the present action; and

> (3) the plaintiff must have become involved in such litigation because of some tortious act of the defendant.

Safeway Stores, Inc. v. Chamberlain Protective Servs., Inc., 451 A.2d 66, 69 (D.C. 1982) concededly met here, and for present purposes we assume that a jury could fairly find that "some tortious act of Rosenthal and Constantine Cannon caused SNR to expend the $300,000 in attorney fees and expenses. But the second element is equally critical: the prior litigation "must have been with a third party *and not with* the defendant in the present action." *Id.* (emphasis added). *See Biddle*, 421 A.2d at 8-9 (denying fee recovery under doctrine because prior litigation was against defendant in present action, as well as third party). And that is where SNR's action fails.

Judge Platt in the federal court had jurisdiction over all matters related to the Libya litigation, including possible disputes over how contingent attorney fees resulting from a settlement would be distributed. Also, once Constantine Cannon asserted there an entitlement to all or part of the $1.6 million resulting from the Copeland portion of the settlement, it - as well as Rosenthal[17] - was undeniably a party to the motions practice in which SNR successfully disputed the effort to deny it any of the $1.6 million. Yet SNR, having prevailed in that litigation, made no effort to obtain attorney fees or related expenses for having been wrongfully forced to litigate over its entitlement to the award. While such fees, of course, would not have been

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[17] He, of course, was in privity with Constantine Cannon as a partner at the firm.

available to it as a matter of course, Judge Platt had ample authority to entertain and grant a request for fees if, as SNR maintains, Constantine Cannon had no colorable basis for asserting entitlement to all or any of the $1.6 million. *See, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 42-53 (1991) (affirming award of attorney fees imposed under the bad faith exception to the American Rule and the court's inherent powers); *Roadway Express, Inc. v. Piper, 447* U.S. 752, 767 (1980) (attorney personally liable for attorney fees under bad faith exception); *Baker v. Urban Outfitters, Inc.*, 431 F. Supp.2d 351, 363, 365-66 (S.D.N.Y. 2006) (federal court could award attorney fees against attorney that sought unwarranted financial windfall under either court's inherent power or 28 U.S.C. § 1927); *see also In re Austrian & German Bank Holocaust Litig.*, 317 F.3d 91, 98 (2d Cir. 2003) ("Whenever a district court has federal jurisdiction over a case, it retains ancillary jurisdiction after dismissal to adjudicate collateral matters such as attorney's fees"). Indeed, as SNR's counterclaim itself pointed out, Judge Platt in awarding the $1.6 million to SNR had declared himself "troubled by what appeared to be an effort [by Constantine Cannon] to leave SNR in the dark about the distribution of the [Copeland settlement] proceeds" and its related contractual share of them. There is thus no reason to doubt that he would have treated seriously a fee petition alleging bad faith. Nor, for that matter, did SNR's claim in Superior Court that Rosenthal and Constantine Cannon had used Mrs. Copeland as a catspaw to divert the $1.6 million to themselves require a lesser showing of bad faith than would have been needed before Judge Platt. *See Goldschmidt v. Paley Rothman Goldstein Rosenberg &*

Cooper, Chartered, 935 A.2d 362, 381 (D.C. 2007) (attorney may be liable only if he "possess[es] a desire to harm [another] which is independent of the desire to protect his client. This would constitute *actual malice,* and therefore substantiate a tortious interference with contract claim" (citation omitted; emphasis added).[18]

SNR asserts that "at the time the fee dispute in the New York federal court was being litigated, many of the relevant facts surrounding [Rosenthal's] and Constantine's tortious conduct had not yet been developed and were not before Judge Platt" (Br. for SNR at 67), the implication being that these came to light only between the issuance of Judge Platt's award of the $1.6 million in July 2006 and the filing of the counterclaim in March 2007. But Judge Platt was clearly aware of many of the facts SNR later alleged as proof of deception and dishonesty by Rosenthal and Constantine Cannon, including the apparent effort he described "to leave SNR in the dark about the distribution of the [Copeland family] proceeds following the settlement of [New Jersey] probate proceedings." Nor does SNR identify the relevant facts that it had no means of discovering in time to bring to Judge Platt's attention, with or without an extension of the prescribed time. *See* FED. R. CIV. PROC. 54 (d)(2)(b) (allowing

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[18] Recognizing this, the counterclaim alleged that "Mr. Rosenthal's and Constantine's actions did not serve the best, or any, interests of the Copelands. Instead, those actions, which put the Copelands into direct breach of their retainer agreement and exposed them to suit, were intended to serve the interests of Mr. Rosenthal and Constantine."

fourteen days from judgment for submission of attorney fees request unless "court order provides otherwise"). SNR further argues that, for purposes of the wrongful involvement in litigation exception, its failure to seek fees against Rosenthal and Constantine Cannon in New York is immaterial because Mrs. Copeland was also a party to the proceedings there (with a putative interest herself in reaping a portion of the $1.6 million), but "is a 'third party' to the present action" (Br. for SNR at 66). The Superior Court judge agreed with this point and told the jury that SNR could recover as long as the New York motion practice was, "in part against Mrs. Copeland." But that misreads the second element of the *Safeway Stores* test, which does not require that the prior litigation was *either* with a third party or not with the defendant in the present action. Rather, it "ordinarily must have been with a third party *and not* with the defendant in the present action." *Safeway Stores*, 451 A.2d at *69* (emphasis added); *see also Taylor v. Tellez*, 610 A.2d at 255.

SNR has given us no reason to relax this requirement,[19] one obviously designed to prevent the exception for wrongful involvement in litigation from swallowing the American Rule that each party must pay its own attorney. Judge Platt, having just finished the task of weighing the competing claims of SNR and Constantine Cannon for the $1.6 million fees, and expert through experience in deciding when litigation is groundless and should be sanc-

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[19] We find here no "special circumstance," *Safeway Stores*, 451 A.2d at 69, justifying departure from the general rule.

tioned by, for example, a shift in attorney fees, *see* FED. R. CIV. PROC. 11, was well suited to consider the *bona fides* of Constantine Cannon's action in forcing SNR to incur the cost of litigating its right to the contingent fee. Since SNR passed up the opportunity to make Constantine Cannon bear all or some of the costs of that litigation, it is not entitled to a second chance now.

IX.

To summarize, we have held that neither SNR's counterclaim nor Rosenthal's claim for damages for the contract years 2003-2004 should have reached the jury, but that the jury's award of compensation Rosenthal should have received for 2005-2006 is supported by the evidence, and he is entitled to that award (minus the compensation he received from SNR and Constantine Cannon for that period) without the erroneous reduction by the earnings Rosenthal would have been due after his retirement from SNR. At the same time, we have held that Rosenthal is entitled to a new trial on compensatory damages for the 2005-2006 period because his proof of those damages was unduly restricted by the trial judge. This leaves us with the apparent anomaly of a disposition that would vacate the damage award in favor of a new trial on that issue when Rosenthal might, after all, prefer to accept the jury's award as correctly reduced. We will excuse his failure to declare himself on this choice in his briefs, since he may not and need not have anticipated the particular constellation of rulings we have made on the issues. In any event, it would be a gross mismanagement of the resources of a busy trial court for us to require it to retry a case on damages if Rosenthal no longer seeks that remedy. In these circumstances, we may properly employ our authority to

order a disposition that is "just in the circumstances," D.C. Code § 17-306, namely: As to damages for the years 2005-2006, we will vacate the jury's award and remand for a new trial on damages; but if Rosenthal decides instead to accept the jury's present award (appropriately reduced to account for the compensation he received from SNR and Constantine Cannon for that period), he must notify the trial court in timely fashion of that election, and the court should reinstate the award and make the necessary deductions.

Affirmed in part and reversed in part; case remanded for further proceedings consistent with this opinion.

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. No. 91-358, 84 Stat. 473 (1970).

§ 11-101. Judicial power

"The judicial power in the District of Columbia is vested in the following courts :

* * *

"(2) The following District of Columbia courts established pursuant to article I of the Constitution :

> "(A) The District of Columbia Court of Appeals.
>
> "(B) The Superior Court of the District of Columbia.

"§ 11-102. Status of District of Columbia Court of Appeals

"The highest court of the District of Columbia is the District of Columbia Court of Appeals. Final judgments and decrees of the District of Columbia Court of Appeals are reviewable by the Supreme Court of the United States in accordance with section 1257 of title 28, United States Code.

APPENDIX G
RECORD EXCERPTS

Partnership Agreement

SNR's Partnership Agreement, as amended in 1999, provides, in relevant part:

3.7 Schedule A. Commencing with the first day of January 1995, each Equity Partner shall receive during the term hereof the percentage of Net Income to Equity Partners or, as provided in Section 8.1 hereof, other compensation stated in Schedule A attached to counterparts hereof, as changed from time to time in accordance with this agreement, each initialed for identification by the Equity Partner whose percentage of Net Income to Equity Partners or other compensation is therein stated and by a member of P&P, on behalf of the partnership provided, however, that the amount received for any year pursuant to this sentence by each London Equity Partner shall be reduced by an amount equal to the net profits distributed to such London Equity Partner, if any, as an equity partner of Sonnenscheins. Notwithstanding such reduction in the amount actually paid by the partnership to such London Equity Partner in any year, he shall be deemed, for purposes of Article 5, 6, and 8 of this Agreement, to have also been paid by the partnership for such year, in addition to the amount actually paid to him, an amount equal to the amount of such reduction. Unless the context otherwise requires, the words "percentages" and "proportionately," shall refer to the percentages stated in the several Schedule A in the aggregate as

they may be changed from time to time in accordance with this agreement. The word "interest" refers to the voting interest calculated in accordance with Section 8.1. The term "ownership interest" refers to all interest in the partnership and its business assets.

* * *

5.1 Retirement

(a) An Equity Partner may voluntarily retire at the end of any month or after attaining age 62. An Equity Partner must mandatorily retire no later than December 31 of the year in which he attains age 65 (or December 31 of the year in which he attains age 70 in the case of a person who was an Equity Partner as of October 1, 1999 and had attained age 61 on or before December 31, 1999); provided, however, that at the sole discretion of P&P, an Equity Partner's mandatory retirement date may be deferred, on a year-by-year basis, to a date that is no later than December 31 of the year in which he attains age 70. A retired equity Partner shall receive retirement benefits provided in accordance with this Article 5.

* * *

6.1 Payments on Death, Retirement or Withdrawal

In the event of the death, retirement or withdrawal of an Equity Partner ("retirement" and "withdrawal" being hereinafter defined in Section 7.2), there shall be paid to the person or persons des-

ignated in the latest writing delivered to the partnership by such partner ("Designated Person") or, in the case there is no such designation, to the personal representative of such deceased partner or to such retired or withdrawn Equity Partner (except that payment under Section 6.1(d)(i) shall be made to the payee described in Section 5.6):

(a) Unwithdrawn Earnings.

An amount equal to (i) his percentage of the Net Income to Equity Partners not theretofore withdrawn by him to and including the last day of the year prior to the year in which such death, retirement or withdrawal occurs, plus (ii) (A) in the case of a deceased or retired Equity Partner, his percentage (in effect on the day on which such death, or retirement occurs) of the Net Income to Equity Partners of the firm for the calendar year in which such death, withdrawal or retirement occurs, multiplied by the number of the month in which such death or retirement occurs (e.g., January is 1, April is 4) and divided by 12, * * * less the amount of his monthly draw in the year of such death, retirement or withdrawal, through the month in which such death, retirement or withdrawal occurs, to the extent previously withdrawn by him. A withdrawal or retirement shall be deemed to occur when determined by P&P to have occurred.

(b) Distribution of Capital and Interest in Assets.

An amount equal to his capital account as shown on the books of the partnership on the day of the month in which such death, retirement or with-

drawal occurs, it being recognized that London Equity Partners have no capital account in the partnership.

(c) Additional Amount on Death or Retirement

Only in the cases of death or retirement, an amount equal to the same percentage of the sum of $1,000,000 as is represented by such deceased or retired Equity Partner's Average Percentage, as defined in Section 5.3, in effect at the date of death or retirement.

(d) Division of Future Income Other Than Indian Fees

i. In the case of retirement or death of an Equity Partner, the retirement or death benefits determined under Sections 5.2 and 5.5, respectively and for the period specified therein.

ii. In the case of Total Disability of an Equity Partner, the benefits provided in accordance with Section 5.5.

* * *

e. Division of Future Indian Fee.

The amount, if any, from time to time due such deceased, retired or withdrawn Equity Partner under Section 4.3 of the 1984-1986 Partnership Agreement.

* * *

* * *

7.1 Continuation of Partnership

After the date of the death, retirement or withdrawal of an Equity Partner, the law practice shall continue as the law practice of the remaining Equity Partners under its present name or such other name as two-thirds in interest of them may determine, and the rights of the deceased, retired or withdrawn Equity Partner in the assets of the partnership and in the Net Income to Equity Partners shall vest in the remaining Equity Partners, and the interest in the Net Income to Equity Partners of such remaining Equity Partners stated in Schedule A shall be adjusted accordingly. The payee of retirement or death benefits, or the personal representative of such deceased Equity Partner, as the case may be, or such retired or withdrawn Equity Partner, although receiving income from the partnership, shall not be a member of the partnership.

* * *

8.2 Change in Partnership Interest.

The percentage may be changed at any time during the term of this agreement by the action of not less than two-thirds in interest of the Equity Partners, but the percentage of an Equity Partner shall not be reduced without his consent, except as provided under Section 8.1; provided, however, that the percentage of net Income to Equity Partners of

all Equity Partners may be changed every two years beginnings as of January 1, 1995. Such changes shall be made in accordance with procedure established from time to time by P&P. of Net Income to Equity Partners to which any Equity Partner shall be entitled

Jury Charge

The trial court charged the jury, in relevant part:

As you may recall, the Court has ruled as a matter of law that Mr. Rosenthal voluntarily retired from the Sonnenschein firm on July 31, 2005.

When considering the evidence presented in this case, you may not make any determinations that contradict this finding.

The Court has also ruled as a matter of law that Mr. Rosenthal is not entitled to any damages for any efforts he may have made on the Libya litigation prior to the time he joined Sonnenschein.

Again, when considering the evidence presented in this case, you may not make any determinations that contradict this finding.

The Plaintiff, Mr. Rosenthal, has two claims against the Defendant. The first claim is called breach of implied covenant of good faith and fair dealing.

Breach of implied covenant of good faith and fair dealing. The covenant is best understood as a way of applying terms -- of implying terms in the agreement, whether employed to analyze unantici-

pated developments or to fill gaps in the contract provisions.

Existing contract terms control. However, such that implied good faith cannot be used to circumvent the parties' bargain or to create a fleeting duty unattached to the underlying legal document.

Thus, one generally cannot base a claim for a claim of a breach of an implied covenant on conduct authorized by the terms of the agreement.

Stated in its most general terms, the implied covenant requires a party in a contractual relationship to refrain from arbitrary or unreasonable conduct which has the effect of preventing the other party to the contract from receiving the fruits of the bargain.

Thus, parties are liable for breaching the covenant when their conduct frustrates the [over]arching purpose of the contract by taking advantage of their position to control implementation of the agreement terms.

This Court has recognized the occasional necessity of applying contract terms to ensure the parties reasonable expectations are fulfilled.

This quantity reformation, however, should be a rare and fact intensive exercise governed solely by issues of compelling fairness.

Only when it is clear form the writing that the contracting parties would have agreed to pr[o]scribe the act later complained of, had they thought to negotiate with respect to that matter may a party invoke the covenant's protection.

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No. 10-243

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

SONNENSCHEIN NATH & ROSENTHAL LLP,

Petitioner,

v.

DOUGLAS E. ROSENTHAL,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT OF COLUMBIA COURT OF APPEALS

BRIEF OF CERTAIN LARGE LAW FIRMS AS *AMICI CURIAE* IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF INTEREST

Amici Curiae are a group of large law firms (the "Amicus Group") who use non-formulaic criteria to set compensation for their firms' owners, variously designated as partners (or equity partners), principals, shareholders, and similar designations.[1] The Amicus Group is comprised of the following firms: Baker & McKenzie LLP, Best Best & Krieger LLP, Cooley LLP, DLA Piper LLP (US), Dykema Gossett PLLC, Locke Lord Bissell & Liddell LLP, Mayer Brown LLP, Perkins Coie LLP, Reed Smith LLP, Schiff Hardin LLP, and Zuckerman Spaeder LLP. The firms range in size from approximately 75 attorneys to more than 3,700. Ten of the 11 firms have offices in the District of Columbia. And several are chartered or incorporated in Delaware.

The Amicus Group is aware of the decision of the District of Columbia Court of Appeals, which endorsed the jury's nullification (under the doctrine of good faith and fair dealing) of the Petitioner's compensation decision for the Respondent and which affirmed the jury's award in the form of civil damages of the amount to which the Respondent contended he was entitled. For the reasons discussed below, the firms in the Amicus

1. Pursuant to Rule 37.2(a), Amici Curiae state that counsel of record received timely notice of the intent to file this brief and that all parties have consented to its filing. Pursuant to Rule 37.6, the Amici Curiae state that no counsel for a party authored this brief in whole or in part nor did such counsel or a party make a monetary contribution intended to fund the preparation or submission of this brief. No one other than the Amicus Group, its members, and its counsel made such a monetary contribution.

Group are deeply concerned about the uncertainty created by and adverse impact on key management decisions of the nation's leading firms, most of which have offices in the District of Columbia, many of which are incorporated or charted in Delaware, and most of which have adopted discretionary, non-formulaic compensation systems with characteristics substantially similar to the Petitioner's.

REASONS FOR GRANTING REVIEW

I. The successful contractual, non-formulaic model of large firm partner compensation is threatened by the jury model applied below.

Firms in the Amicus Group have adopted non-formulaic compensation systems via contract (partnership agreements or their equivalent), vesting broad discretion in select committees of their colleagues to recommend (subject to approval by the respective partnerships) or to set (with no further review) the appropriate allocation of profits for designated periods (typically one or two years). While the use of non-formulaic criteria is by no means the only way to divide profits (e.g., some firms proceed on a lock-step basis that graduates compensation with years of service), it is the predominant method adopted by the nation's largest law firms. *See,* Pet. at 16 n.17. Firms such as those in the Amicus Group have exercised their judgment to adopt a non-formulaic compensation system, consistent with firm culture, that best achieves their goals of attracting and retaining talent and providing the highest quality of professional service to their clients. Indeed, they believe that they risk the

loss of talent absent this method of evaluating and rewarding it.

There exists, not surprisingly, a consensus among law firm managers and their partners that the processes of recommending and setting compensation in a non-formulaic system are among the most difficult decisions they make. Compensation committees do not operate with perfect information. The division of profits is a zero-sum game. Whether the committee makes recommendations (as in some firms, like Petitioner's) or whether it makes the ultimate decision concerning partner compensation (as in other firms), the results are necessarily a compromise, allocating a fixed resource among many diverse stakeholders. And as with any compromise among five, a dozen, or hundreds of individuals, there will inevitably be those who are disappointed that their own compensation is too low or that others' compensation is too high. Indeed, that is true even when the disappointed can nonetheless count themselves among the financially fortunate, compared to the vast majority of practicing attorneys (much less the public at large).

Firms using non-formulaic compensation systems do not survive because of inertia or indifference. Rather, if they survive and prosper it is because the respective partnerships recognize that, having entrusted the recommendations or decisions to the committee, the committee has acted with integrity, striving to ensure that its actions meet the test of relative fairness across the partnership. For if the ultimate decisions are not perceived as relatively fair by the shareholders, the glue that holds the firm together will dissolve and the firm

will risk failure. And that requirement of fairness for survival is a far more effective, not to mention lawful, guarantor of fair decision-making than the specter of jury nullification.

Of course, a decision perceived as fair even by the vast majority of a firm's shareholders will not advance the firm's interests unless it is also final. Finality — in setting compensation, as with other business decisions — is as important to the nation's large law firms as it is to any other business.

Having agreed to be bound, by contract, to non-formulaic compensation systems, the partners in these firms would be highly unlikely to have realized that they had agreed — implicitly or otherwise — to have a lay jury review and revise the compensation committee's recommendations or decisions, resetting the compensation of disappointed partners in the form of civil damages. But that is precisely the procedure fashioned by the courts below and imposed on the Petitioner. Indeed, the jury was permitted not only to adjust the Respondent's compensation by deciding the "fair" weight to give his assigned collections, it was also allowed to *reset* the proper amount of those collections by reallocating billing credit within the firm for other matters.

Permitting a jury to reset an individual partner's compensation under a good faith and fair dealing standard directly impairs a contractual non-formulaic compensation system by stripping it of the very flexibility that gives it value. Indeed, it permits the disappointed to wait until the committee has done the

heavy lifting and then asks a lay jury to serve as a quasi-appellate court. No firm in this country would design such a system. And no partnership would agree to it.

II. The holding below presents an "exceptional situation where egregious error has been committed."

As the Petition makes clear, review of decisions of the District of Columbia Court of Appeals may be appropriate "'in exceptional situations where egregious error has been committed.'" Pet. at 8, *quoting Pernell v. Southall Realty*, 416 U.S. 363, 369 (1974) (internal citations omitted). The Amicus Group agrees that, for the reasons stated in the Petition, this is such a case.

First, the decision below violates the most fundamental principle of contract law — that the parties' intent should govern. The parties in this case plainly intended to vest discretion for making compensation recommendations in the compensation committee, not juries.[2]

Second, the lower court's basis for ignoring the parties' intent — an application of the implied covenant of good faith and fair dealing — is entirely unsupportable in this case. Delaware law is clear that the covenant does not apply when the situation under challenge (here, compensation setting) is governed by contract. *See* Pet. at 12. The firms in the Amicus Group, the majority of whom have offices in the District of

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2. And partners in some of the firms in the Amici Group, and nationwide, have vested the ultimate decision concerning compensation in their respective committees.

Columbia and many of whom are charted or incorporated in Delaware, have serious concern about the potential broad reach of the lower court's decision.

The lower court offered no reason why law firms with non-formulaic compensation systems must live by a different set of rules than other law firms and other businesses. Nowhere else does an entity governed by Delaware law face a jury's review of discretionary decisions specifically permitted or required by contract. On the other hand, should the rulings below remain intact, any trial judge in the District of Columbia or, indeed, any judge dealing with a contract governed by Delaware law, may point to this precedent to justify sending to a jury a result covered by that contract but perceived by that judge, for whatever reason, to be "unfair." Such a precedent may be undone only by this Court, and should be.

CONCLUSION

Because the decision below is contrary to the contractual provisions that govern partner compensation in many large law firms and because it is so fundamentally at odds with common practice, common sense, and the law of contracts, the Amicus Group urges the Court to grant review.

Respectfully submitted,

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